In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-350

UNITED STATES OF AMERICA, *Appellant*

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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Docket Entries

In the United States District Court
for the Southern District of Mississippi
Jackson Division

(Civil Action No. 4554)

Date	Filings—Proceedings
11-3-69	Complaint, original and ten copies, filed.
11-3-69	Applicant of Plaintiff for convening Three-Judge District Court, original and three copies, filed.
11-3-69	Summons, original and seven copies, copies having attached copy of complaint, issued and handed U.S. Marshal.
11-3-69	Copy of complaint and application for convening of three-judge court mailed Judge Walter L. Nixon, Jr.
11-12-69	Designation by Chief Judge John R. Brown of Circuit Judge Charles Clark and District Judges Harold Cox and Dan M. Russell, Jr., to hear and determine the cause. Filed and entered OB 1969, P. 1129-1130.
11-12-69	Copy of Designation and copy of complaint handed Sue for Judge Cox, mailed Judge Russell and Judge Clark.
11-28-69	Marshal's return on summons executed as to each and all defendants, filed.
12-11-69	Motion of Defendants for additional time within which to file answer with certificate of service, filed.
12-15-69	ORDER: Defendants granted additional thirty days from date of this order to file an answer. Filed and entered OB 1969, P. 1223. (copies mailed attorneys of record)
12-29-69	Letter from U.S. Attorney requesting issuance of alias summons to all defendants, filed.

Date	Filings—Proceedings
12-29-69	Alias Summons, original and five copies, copies having attached copy of complaint, issued and handed U.S. Marshal.
1-7-70	Marshal's return on summons executed as to Arny Rhoden, State Tax Commission, Jimmie Walker, Excise Tax Commissioner, Woodley Carr, Ad Valorem Commissioner, Kenneth Stewart, Director of Alcoholic Beverage Control Division, filed.
1-19-70	Motion of Defendants for a more definite statement with certificate of service, filed.
1-19-70	Notice of Motion of Defendants for a more definite statement for 2-20-70 at Jackson, Mississippi with certificate of service, filed.
5-12-70	ORDER: Motion for a more definite statement is overruled and prayer thereof denied. Defendants are granted an extension of time until 5-21-70 in which to answer. Filed and entered OB 1970, P. 715 (copies mailed attorneys of record)
5-21-70	Answer of defendants to complaint, with certificate of service, filed.
5-22-70	Copy of above Answer mailed Judges Russell and Clark, handed Anne Crews for Judge Cox
7-15-70	Interrogatories of Defendants to Plaintiff, filed.
8-12-70	ORDER: United States have additional time until 9-4-70 to answer interrogatories. Filed and entered OB 1970, P. 1121. (Copy handed U.S. Attorney, mailed Taylor Carlisle and Guy Rogers)
8-19-70	Interrogatories to Defendant Pursuant to Rule 33, Federal Rules of Civil Procedure, with Certificate of Service, filed.
9-8-70	Plaintiff's objections to Defendant's interrogatories, with certificate of service, filed.
9-8-70	Plaintiff's answer to Defendants' interrogatories with certificate of service, filed.

Date	Filings—Proceedings
10-5-70	Answer of Defendants to Interrogatories by Plaintiff with certificate of service and attached copy of letter, filed.
2-4-71	Defendants' Motion for Summary Judgment with Memorandum in Support thereof attached, with certificate of service, filed.
2-4-71	Defendants' Notice of Motion for Summary Judgment for hearing on 2-26-71 in Jackson, Miss., filed.
2-4-71	Defendants' Withdrawal of Certain Interrogatories Propounded to Plaintiff by Defendants, with certificate of service, filed.
2-4-71	Copy of defendants' Motion for Summary Judgment and attached Memorandum in support thereof handed Judge Cox, mailed Judges Russell and Clark.
9-22-71	Stipulation of Facts between Plaintiff United States of America and Defendants State Tax Commission of the State of Mississippi, et al, with attachments, filed.
9-22-71	Copy of above Stipulation mailed Judges Russell and Clark and copy handed Jean Nall for Judge Cox.
9-28-71	Plaintiff's Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, with attached Plaintiff's Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment, and certificate of service, filed.
9-28-71	Copies of above Motion and Memorandum mailed to Judges Russell and Clark and copy handed Jean Nall for Judge Cox.
9-29-71	Defendant's opposition to plaintiff's Cross-Motion for Summary Judgment with certificate of service, filed. (Copy handed Judge Cox.

Date	Filings—Proceedings
	Copies mailed Judges Dan M. Russell and Judge Charles Clark ON 9/30/71).
3-24-72	OPINION: Defendants are entitled to summary judgment on all issues, filed. (Judge Charles Clark) (Copies mailed attorneys of record) (Memo to J. Nall)
3-24-72	SPECIAL CONCURRING OPINION: . . . The complaint in this case is without merit and should be dismissed with prejudice without any assessment of costs, filed. (WHC) (Copies mailed all attorneys of record) (Memo to J. Nall)
3-30-72	JUDGMENT: the complaint in the captioned case is without merit and is dismissed with prejudice without any assessment of costs, filed and entered OB 1972, Page 401 (Charles Clark, DMR, WHC) (Copy mailed attorneys; copy handed Judge Cox and mailed Judges Russell and Clark) (Memo to J. Nall & J. Speights)
3-30-72	Final J.S. 6 Card.
5-1-72	Plaintiff's Notice of Appeal to Supreme Court of the United States from final judgment of 1-30-72, with certificate of service, filed. (Certified copy mailed Supreme Court)

A true copy, I hereby certify.
ROBERT C. THOMAS, *Clerk*
By: /s/ S. Carter
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMIE WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI,
DEFENDANTS.

[Filed November 3, 1969]

COMPLAINT

The United States of America alleges the following:

1. The Court has jurisdiction of this action under 28 U.S.C. 1345.

2. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

3. The lands comprising Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base and the Meridian Naval Air Station were purchased by the United States with the consent of the State of Mississippi.

4. The State of Mississippi ceded to the United States and the United States accepted exclusive jurisdiction over the lands comprising Keesler Air Force Base and the United States Naval Construction Battalion Center; and Keesler Air Force Base and the United States Naval Construction Battalion Center are situated on lands over which the United States has exclusive jurisdiction.

5. The State of Mississippi ceded to the United States

and the United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station; and Columbus Air Force Base and the Meridian Naval Air Station are situated on lands over which the United States and the State of Mississippi have concurrent jurisdiction.

6. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmens' Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—Closed, Chief Petty Officers' Mess—Open, Enlisted Men's Club, and the Navy Exchange Department of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—Open, the Commissioned Officers' Mess—Closed, the Commissioned Officers' Mess—Open, the Navy Exchange Enlisted Mens' Club, and the Centralized Package Store at Meridian Naval Auxilliary Air Station are Instrumentalities of the United States operating with nonappropriated funds, are entitled to the sovereign immunities and privileges of the United States, are located in the State of Mississippi and are or have been engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned. These agencies are referred to hereinafter as "Instrumentalities of the United States."

7. Under its enumerated powers concerning regulation of land and naval forces and military reservations pursuant to Art. I, Sec. 8, Cl. 14 of the Constitution of the United States, the Congress, in Section 6 of the 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473, authorized the Secretary of Defense "to make such regulations as he may deem appropriate governing the sale, consumption, possession of or traffic in * * * intoxicating liquors to or by members of the Armed Forces at or near any camp * * * or other place primarily occupied by members of the Armed Forces * * *".

8. Pursuant to the above cited authority, the Secretary of Defense issued Department of Defense Directive 1330.15 dated 4 May 1964, 32 CFR 261.4(c). This Directive requires that the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within

the United States shall be in such a manner and under such conditions as shall obtain for the Government of the United States the most advantageous contract, price and other factors considered.

9. The Armed Services Procurement Act, 10 U.S.C. 2305(c) requires that a contract be granted to the bidder whose bid "will be the most advantageous to the United States, price and other factors considered." Although the Act applies only to appropriated fund activities of the Armed Services of the United States, its requirement that procurement be at the most advantageous price has been adopted by the Secretary of Defense in said Directive as the governing procurement policy for the aforesaid Instrumentalities of the United States.

10. The Directive and procurement policy adopted from the Act referred to in Pars. 8 and 9 hereinabove require the aforesaid Instrumentalities of the United States engaged in the purchase of alcoholic beverages for resale to obtain said alcoholic beverages at the lowest competitive price most advantageous to the United States.

11. The State of Mississippi Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265 01 et seq., enacted July 1, 1966, imposes strict regulatory control on the possession and sale of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

12. Sec. 10265-01 et seq. of the Mississippi Code (1942) Annotated, was enacted after the United States obtained jurisdiction over the lands upon which the aforesaid Instrumentalities of the United States are situated, all as described in paragraphs 4 and 5 hereinabove.

13. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission promulgated Regulation No. 22 entitled "Sales to Military Post Exchanges, etc., effective September 1, 1966," hereinafter referred to as Regulation 22, which attempts to regulate, tax and control Instrumentalities of the United States located in the State of Mississippi, which are engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned.

14. Regulation 22 requires the aforesaid Instrumentalities of the United States to order alcoholic beverages direct from the distiller and/or supplier or to purchase them from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

15. Regulation 22 further requires the aforesaid Instrumentalities of the United States to pay a seventeen percent "mark-up" on distilled spirits and a twenty percent "mark-up" on wine, whether purchases are made directly from the distiller or from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission. These "mark-ups" are percentages of the normal wholesale purchase price and are added on to such purchase price.

16. When purchasing alcoholic beverages from distillers or suppliers, the State of Mississippi requires the aforesaid Instrumentalities of the United States to pay the aforementioned "mark-ups" to the distillers and/or suppliers and said distillers and/or suppliers to collect said "mark-ups" and in turn remit them directly to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

17. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission requires that the "mark-ups" be paid by the aforesaid Instrumentalities of the United States when making purchases directly from distillers and/or suppliers although the State does not handle the merchandise in connection with such purchases, does not provide any facilities, and does not perform any services in connection with such purchases, the net result of Regulation 22 being that the so-called "mark-ups" are in fact taxes.

18. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission is not a party to purchases by the aforesaid Instrumentalities of the United States from distillers and/or suppliers.

19. Regulation 22 requires distillers and/or suppliers which sell alcoholic beverages to the Instrumentalities of the United States located in the State of Mississippi, to strictly observe said regulation and any distiller and/or supplier who fails or refuses to strictly observe Regulation 22 is considered to have violated the Alcoholic Beverage Control Laws of the State of Mississippi and is promptly deprived of the benefits of same including the right to sell

his products to the Alcoholic Beverage Control Division, the sole authorized wholesaler in the State of Mississippi; and in addition thereto he may be prosecuted for violation thereof and subjected to criminal penalties therefor. As a result distillers and/or suppliers, fearful of losing the opportunity to sell their products to the agencies of the State of Mississippi and fearful of criminal prosecution, have refused and continue to refuse to sell their products to the aforesaid Instrumentalities of the United States without collecting from these Instrumentalities the so-called "mark-up" percentages and remitting them to the said Division.

20. As a condition for doing business in the State of Mississippi distillers and/or suppliers are required to furnish the Alcoholic Beverage Control Division of the State a price list and to agree not to sell to any of the aforesaid Instrumentalities of the United States at a lower price than to the State of Mississippi.

21. Defendants have sought to require each of the aforesaid Instrumentalities of the United States to obtain an alcoholic beverage permit from the Alcoholic Beverage Control Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi.

22. Defendants are prohibited by the Federal Constitution from regulating, taxing and otherwise controlling the procurement of liquor by Instrumentalities of the United States located in the State of Mississippi.

23. The aforesaid Instrumentalities of the United States have made these "mark-up" payments under protest to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission either directly or indirectly through distillers and/or suppliers in an amount in excess of $319,740.51 since September 1966 and continue to do so under protest.

24. The acts of the defendants aforementioned have caused damage to the aforesaid Instrumentalities of the United States in an amount in excess of $319,740.51 and will continue in a proportionate amount or more for the foreseeable future. Such sums paid and to be paid legally belong to the aforesaid Instrumentalities of the United States and not to defendants and the collection thereof constitutes an unjust enrichment to the defendants at the

expense of the aforesaid Instrumentalities of the United States.

25. Regulation 22, as applied to purchases by the aforesaid Instrumentalities of the United States, is illegal and void and is prohibited by the Constitution of the United States because: (a) it is in conflict with the procurement policy established for Instrumentalities of the United States by the Secretary of Defense pursuant to authority vested in him by an Act of Congress; (b) it invades and interferes with the exercise of powers expressly delegated by the Constitution of the United States to the Congress; (c) it infringes the Federal Government's immunity from taxation by the States; and (d) the State of Mississippi is without jurisdiction to apply its laws to the lands upon which the aforesaid Instrumentalities of the United States are situated.

WHEREFORE, the United States respectfully prays that:

1. In accordance with 28 U.S.C. 2284(1), this Court immediately notify the Chief Judge of the United States Court of Appeals for the 5th Circuit that this is an action to restrain the enforcement of an order made by an administrative board or commission acting under state statutes upon the ground of unconstitutionality within the meaning of 28 U.S.C. 2881, and request him to designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action.

2. Upon hearing of this action, Regulation 22 be declared null and void and defendants, their officer, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be enjoined and restrained from regulating, taxing or controlling purchases of alcoholic beverages by Instrumentalities of the United States, aforementioned hereinabove, located in the State of Mississippi, either directly or indirectly through distillers and/or suppliers doing business with the United States.

3. Upon hearing of this action, there be a judgment in favor of the United States of America and against all defendants jointly and severally in the sum of $319,740.51 with interest according to law until paid, which sum has heretofore been paid under protest to defendants directly or indirectly as alleged; and there be a further judgment

in favor of the United States of America and against defendants jointly and severally in a sum certain equal to the amount which the aforesaid Instrumentalities of the United States may pay in the future to defendants under protest directly or indirectly in excess of the $319,750.51 already paid to date as stated hereinabove.

/s/ Robert E. Hauberg
United States Attorney
/s/ Joseph E. Brown, Jr.
Assistant United States Attorney

VERIFICATION

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss

Major Thomas V. Ball, being duly sworn, deposes and says:

That he is an air force officer on active duty, assigned to the Office of the Judge Advocate General, United States Air Force; that he is authorized to act herein and to make verification on behalf of plaintiff herein; that in accordance with the duties of his office, he has read the foregoing complaint and that the matters therein alleged are true as affiant is informed and verily believes.

/s/ Major Thomas V. Ball

Subscribed and sworn to before me this 14th day of October, 1969.

/s/ Audrey Anne Crump
Notary Public
My commission expires Aug. 31, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed November 3, 1969]

[TITLE OMITTED IN PRINTING]

APPLICATION FOR CONVENING OF THREE-JUDGE DISTRICT COURT

Plaintiff, the United States of America, upon the complaint heretofore filed, hereby makes application for hearing of this cause and of the plaintiff's motion for a permanent injunction herein before a three-judge district court as required by Section 2284(1), Title 28, United States Code, and requests that the Chief Judge of the United States Court of Appeals for the Fifth Circuit be notified pursuant to Section 2284, Title 28, United States Code, of presentation of plaintiff's application for injunction in order that necessary designation of judges for said Court may be made.

/s/ Robert E. Hauberg
United States Attorney

/s/ Joseph E. Brown, Jr.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed May 12, 1970]

[TITLE OMITTED IN PRINTING]

ANSWER

Come now all of the Defendants in this cause and file their Answer to the Complaint exhibited against them.

I.

The Defendants admit the allegations contained in Paragraph 1 of the Complaint.

II.

The Defendants admit the allegations contained in Paragraph 2 of the Complaint.

III.

The Defendants admit the allegations contained in Paragraph 3 of the Complaint.

IV.

The Defendants deny the allegations contained in Paragraph 4 of the Complaint.

V.

The Defendants admit the allegations contained in Paragraph 5 of the Complaint.

VI.

The Defendants admit that the clubs named in Paragraph 6 of the Complaint operated with non-appropriated funds, are located in the State of Mississippi, are engaged in the purchase of alcoholic beverages for resale, but deny that they are operated as instrumentalities of the United States and are thereby entitled to the sovereign immunities and privileges of the United States.

VII.

The Defendants admit that *50 USC App. 473* authorizes the Secretary of Defense to make regulations but denies that the statute authorizes the Secretary of Defense to make any regulations concerning intoxicating liquors that require conduct in violation of state law.

VIII.

The Defendants admit that Department of Defense Directive No. 1330.15, dated 4 May 1964, 32 CFR 261.4(c), has been issued but deny that it can be interpreted to authorize the purchase of alcoholic beverages for resale at any location within the United States without violating the Twenty-First Amendment to the United States Constitution.

IX.

The Defendants admit the allegations in the first sentence of Paragraph 9 of the Complaint but deny that the Secretary of Defense has the authority to extend the provisions of the Armed Services Procurement Act to the procurement of alcoholic beverages with non-appropriated funds. The Defendants also deny that the military bases referred to in the Complaint are instrumentalities of the United States.

X.

The Defendants deny the allegations of Paragraph 10 of the Complaint.

XI.

The Defendants admit the allegations of Paragraph 11 of the Complaint.

XII.

The Defendants admit the allegations of Paragraph 12 of the Complaint but deny that the clubs referred to in Paragraphs 4 and 5 of the Complaint are instrumentalities of the United States.

XIII.

The Defendants admit the allegations of Paragraph 13 of the Complaint but deny that Regulation 22 attempts to regulate tax and control instrumentalities of the United States located in the State of Mississippi, which are engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned.

XIV.

The Defendants admit that Regulation 22 requires clubs to purchase alcoholic beverages direct from the distiller and/or supplier or to purchase them from the Alcoholic Beverage Control Division of the State Tax Commission but denies that the clubs are instrumentalities of the United States.

XV.

The Defendants admit the allegations of Paragraph 15 of the Complaint but deny that the clubs are instrumentalities of the United States.

XVI.

The Defendants admit the allegations of Paragraph 16 of the Complaint but deny that the clubs are instrumentalities of the United States.

XVII.

The Defendants deny the allegations of Paragraph 17 of the Complaint.

XVIII.

The Defendants deny the allegations of Paragraph 18 of the Complaint.

XIX.

The Defendants deny the allegations of Paragraph 19 of the Complaint.

XX.

The Defendants deny the allegations of Paragraph 20 of the Complaint.

XXI.

The Defendants admit the allegations of Paragraph 21 of the Complaint.

XXII.

The Defendants deny the allegations of Paragraph 22 of the Complaint.

XXIII.

The Defendants deny the allegations of Paragraph 23 of the Complaint.

XXIV.

The Defendants deny the allegations of Paragraph 24 of the Complaint.

XXV.

The Defendants deny the allegations of Paragraph 25 of the Complaint.

XXVI.

The Defendants deny that the Plaintiff is entitled to any relief, injunctive or otherwise, based on the allegations of the Complaint and deny that the Plaintiff is entitled to a judgment against the Defendants, jointly or severally, in the sum of $319,740.51, or in any amount.

Respectfully submitted this the 21st day of May, 1970.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMY WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI, Defendants.

By: /s/ Guy N. Rogers
GUY N. ROGERS,
Assistant Attorney General
One of the Attorneys for Defendants

/s/ Taylor Carlisle
TAYLOR CARLISLE,
Attorney for the State Tax Commission

/s/ James E. Williams
JAMES E. WILLIAMS,
Attorney for the State Tax Commission

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed September 8, 1970]

[TITLE OMITTED IN PRINTING]

PLAINTIFF'S ANSWER TO DEFENDANTS' INTERROGATORIES

Major David M. Lewis, Jr., an Air Force officer, assigned to the Litigation Division of the Office of the Judge Advocate General, United States Air Force, being duly sworn, deposes and says that the following Answers to Defendants' Interrogatories are true to the best of his knowledge, information and belief.

* * * * *

3. As to each of the fourteen alleged federal instrumentalities named in paragraph 6 of the complaint:

(a) When were each of these clubs established and by what authority?

ANSWER: (1) *Keesler Air Force Base:* Under the authority of Air Force Manual 176-3, Airmen's Open Mess, established January 12, 1951; Officers' Open Mess, established December 7, 1941; NCO Open Mess, established July 4, 1946.

(2) *Columbus Air Force Base:* Although available records do not provide a specific date, the Officers' Open Mess, and the Noncommissioned Officers' Open Mess, were established sometime between 1951 and 1956 under the authority of Air Force Manual 176-3.

(3) *United States Naval Construction Battalion Center:* The Commissioned Officers' Mess (Closed), established April 29, 1966, in accordance with authority granted by the Chief of Naval Personnel by letter reference PERS-G12 MEB, March 30, 1966; Chief Petty Officers' Mess (Open), established July 18, 1966, in accordance with authority granted by the Chief of Naval Personnel by letter, reference PERS-G12 MEB dated July 18, 1966; Navy Exchange Package Store, established October 20, 1967, in accordance with authority granted by the Secretary of the Navy by letter

dated October 20, 1967; Enlisted Men's Club, established as an integral part of the Navy exchange, February 21, 1967, in accordance with the Navy Exchange Manual.

(4) *Naval Air Station, Meridian:* Enlisted Men's Club, established in 1961 on the approval of the Navy Resale System Office; Chief Petty Officers' Mess, established April 1961; Commissioned Officers' Mess (Open), established October 6, 1960, by authority of the Chief of Naval Personnel. The Commissioned Officers' Mess (Closed) purchases no liquor independently and procures wine from the Commissioned Officers' Mess (Open). The Centralized Package Store was discontinued in 1967.

* * * * *

(e) Is club membership confined to members of the Armed Forces on active duty or does it include members of the Reserve Components, Reserve and National Guard, and retired members of the Armed Forces and of the Reserve Components?

ANSWER: (1) *Keesler Air Force Base:* Membership can be obtained in the Officers' Open Mess by active duty personnel and their widows, and by retirees and their widows. Membership is not available to retired reservists. Members of the National Guard and reservists can apply for membership, but their applications must be approved on an individual basis by the Advisory Council before becoming a member.

Membership can be obtained in the NCO Open Mess by active duty personnel and their widows, retirees and their widows, and by retired reservists and their widows. Memberships are not available to members of reserve components or the National Guard.

Membership can be obtained in the Airmens' Open Mess by active duty personnel and their widows, and by personnel (and their widows) medically retired from active duty. Those who cannot obtain membership in the Airmens' Open Mess are members of reserve components and the Reserve and National Guard. All enlisted personnel in Grades E-1 to E-3 of all services in temporary duty, detached duty, or in transit status at Keesler Air Force Base can become Associate Members.

(2) *Columbus Air Force Base:* The Officers' and NCO Clubs both allow membership to personnel of Reserve units not on active duty and to retired members of the Armed Forces.

(3) *Naval Construction Battalion Center:* The Commissioned Officers' Mess (Closed), the Chief Petty Officers' Mess (Open), and the Navy Exchange Package Store do not operate on a membership basis as such. The privileges and services of each instrumentality are available depending upon the status of the individual concerned as determined by Naval Regulations, Directives, Instructions and Manuals. The services and privileges of each instrumentality are available to members of reserve components and National Guard on active duty for 72 hours or more, and to retired members of the Armed Forces on the retired list with pay, including members of the Fleet Reserve and Fleet Marine Corps Reserve on active duty. Inactive reserve personnel performing scheduled periods of inactive duty training drills do not have Package Store privileges.

(4) *Naval Air Station, Meridian:* Enlisted Men's Club membership is open to personnel of the Armed Forces on active duty, reserve components, reserve and National Guard and retired military personnel.

The CPO Mess membership is open to all Chief Petty Officers on active duty stationed at the Naval Air Station at Meridian.

Commissioned Officers' Mess (Open) membership is limited to members who are either active duty military, retired military, officers of the U.S. Environmental Science Services Administration and the U.S. Public Health on active duty or on the retired list with pay, or unremarried widows of officers of the Armed Forces of the United States who died while on active duty or on retired list with pay.

* * * * *

(h) Are the clubs open to any persons other than military personnel?

ANSWER: In addition to those members listed in the Answer to Interrogatory 3(e) above, clubs are open to their dependents and guests. However, guests are

not allowed to make any purchase or share in any expense incurred by their hosts.

• • • • •

(s) When did the clubs commence purchasing alcoholic beverages for resale in packaged form?

ANSWER: (1) *Keesler Air Force Base:* The Package Store which operates under the Officers' Open Mess began operation in November 1956; the Package Store which operates under the NCO Open Mess began operation in November 1957; the Airmens' Open Mess never has had a package store operation.

(2) *Columbus Air Force Base:* The Officers' Club and the NCO Club commenced purchasing alcoholic beverages for resale in package form in January 1957.

(3) *U. S. Naval Construction Battalion Center:* The Chief Petty Officers' Mess (Open) commenced purchasing alcoholic beverages for resale in packaged form after April 17, 1970. (the Secretary of the Navy had previously authorized the establishment of such sales outlets at the Naval Construction Battalion Center by letter dated October 20, 1967); the Navy Exchange Package Store commenced purchasing alcoholic beverages for resale in packaged form during November 1967 and commenced selling alcoholic beverages in packaged form during December 1967; the Commissioned Officers' Mess (closed) and the Enlisted Mens' Club do not purchase alcoholic beverages, other than beer, for resale in packaged form.

(4) *Naval Air Station, Meridian:* The Enlisted Mens' Club has purchased liquor for resale in packaged form since 1961; the CPO Mess was authorized to resume individual package store sales on September 6, 1968 (club records do not show authorization prior to that date); the Commissioned Officers' Mess (Open) purchased alcoholic beverages for resale in packaged form from March 1, 1962, to March 31, 1967 and commenced the sale of packaged liquor again on August 30, 1968.

• • • • •

(x) Were sales confined to members of the United States Armed Forces?

ANSWER: In accordance with applicable regulations, sales were generally confined to active duty personnel

and their widows, and retirees and their widows of the United States Armed Forces, and in exceptional circumstances, to military personnel of foreign armed forces stationed at the installation for training purposes.

* * * * *

/s/ David M. Lewis, Jr.
DAVID M. LEWIS, JR.
Major, United States Air Force,
Litigation Division, Office of the
Judge Advocate General, USAF.

Subscribed and sworn to before me this 2nd day of September, 1970.

/s/ Angeline Johns
Notary Public

My Commission expires April 14, 1972

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed February 4, 1971]

Now come the defendants herein by their attorneys and move the Court for an entry of a summary judgment dismissing the complaint with prejudice pursuant to Rule 56 of the Federal Rules of Civil Procedure. The grounds of the motion are that the admissions on file in the complaint and in the plaintiff's answers to interrogatories show that there is no genuine issue as to the material facts. These facts may be summarized as follows:

A. AS TO THE CLAIM FOR A MONEY JUDGMENT

1. The indirect payments plaintiff seeks to recover were made out of non-appropriated funds and passed on by the military clubs and messes making them to their alcoholic beverage customers.

2. These payments were directly made by suppliers to the Mississippi State Tax Commission as a condition of selling alcoholic beverages to Mississippi customers.

B. AS TO THE CLAIM THAT MISSISSIPPI'S COLLECTION OF ITS WHOLESALE MARK-UP ON SALES TO MILITARY RETAIL OUTLETS VIOLATES THE UNITED STATES CONSTITUTION

1. There is no federal legislative authority for conducting a military alcoholic beverage business free of state imposed requirements on purchases made for resale.

2. Since June 6, 1966, there has been no federal administrative authority for conducting such a business without complying with state laws controlling such purchases.

3. The transactions in question all require the transportation of alcoholic beverages within the State of Mississippi and are, therefore, subject to paragraph 2 of the 21st Amendment to the United States Constitution.

The factual grounds and legal arguments supporting

this motion are more fully set forth in the attached memorandum.

Respectfully submitted,
A. F. SUMMER, ATTORNEY GENERAL

BY:

/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General
Attorney for Defendants

/s/ James E. Williams
JAMES E. WILLIAMS

/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorneys for the Mississippi State Tax Commission

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

[Filed September 28, 1971]

Now comes the plaintiffs in the above entitled action by their attorney to oppose defendants' motion for summary judgment and to move the court for an entry of summary judgment pursuant to Rule 56 of the Rules of Civil Procedure for the United States District Courts. The basis of the cross motion and the opposition to defendants' motion is that the answer to the complaint of the plaintiff by the defendant, defendants' answers to the interrogatories posed by the plaintiff, and the stipulation of facts between plaintiff and defendants indicate that the allegations set forth in the complaint of the United States of America have not been refuted, that there is no genuine issue as to any material fact, and that therefore the plaintiff, United States of America, should be granted summary judgment, and entitled to the judgment prayed for in the complaint as a matter of law.

The issues upon which the cross motion of the plaintiff for summary judgment is based may be particularized as follows:

A. The State of Mississippi's regulatory scheme for collecting "markups" from the military clubs burdens the exercise by the United States of its constitutional powers to maintain the Armed Services.

B. The State of Mississippi through the enforcement of the "markups" imposed by Regulation 22, has unlawfully levied a tax on governmental instrumentalities of the United States.

C. The state law and its implementing regulations have no force and effect in areas over which the United States Government has acquired exclusive jurisdiction (Keesler Air Force Base and United States Naval Construction Battalion Center.)

The factual basis and substantive legal arguments and citations supporting this cross motion and opposing defendants' motion are more fully set forth in the attached memorandum of law in support of plaintiff's cross motion for summary judgment and in opposition to defendants' motion for summary judgment.

Respectfully submitted,
/s/ Robert E. Hauberg
ROBERT E. HAUBERG
United States Attorney
Southern District of
Mississippi
Jackson Division
By: /s/ Joseph E. Brown, Jr.
JOSEPH E. BROWN, JR.
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

[Filed September 22, 1971]

STIPULATION OF FACTS BETWEEN PLAINTIFF UNITED STATES OF AMERICA AND DEFENDANTS STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

The plaintiff United States of America and defendants State Tax Commission of the State of Mississippi, et al., herein stipulate that the following facts are true and correct, without prejudice to the right of any party to object to any of said facts as incompetent, immaterial or irrelevant evidence in this case:

1. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

2. The four bases were purchased by the United States with the consent of the State of Mississippi.

3. The lands comprising Keesler Air Force Base at Biloxi and the United States Naval Construction Battalion Center at Gulfport, Mississippi were acquired in the following manner:

(a) *Keesler Air Force Base.* The main base, which, comprises 1,061.92 acres, was acquired as follows: 717.20 acres by letter to Governor Fielding L. Wright from Harold C. Stuart, Assistant Secretary of the Air Force, dated April 19, 1950, and acknowledged April 24, 1950 (Exhibit 1); 344.72 acres by general blank letters of acceptance as follows: (1) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War dated January 9, 1945, and acknowledged January 15, 1945 (Exhibit 2); (2) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War, dated May 12, 1944, and acknowledged May 15, 1944 (Exhibit 3); (3) letter to Governor Paul B. Johnson from Henry L. Stimson, Secretary of War, dated May 26, 1943 and acknowledged June 1, 1943 (Exhibit 4).

(b) *U.S. Naval Construction Battalion Center.* The lands were acquired by Declaration of Taking filed by the Secre-

tary of the Navy in the District Court of the United States for the Southern Division of the Southern District of Mississippi, as follows: (1) *United States of America* v. *911.50 acres, more or less, in Harrison County, Mississippi, G. B. Dantzler, et al.,* Civil No. 216, filed on April 30, 1942. Jurisdiction over this property was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942, and acknowledged December 29, 1942 (Exhibit 5); (2) *United States of America* v. *2.4 acres of land, more or less, in Harrison County, Mississippi, Mrs. Anna J. Ott, et al.,* Civil No. 224, filed on November 6, 1942. Jurisdiction over this land was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942 and acknowledged December 29, 1942 (Exhibit 6). (3) *The United States of America* v. *223 acres of land in Harrison County, Mississippi, Mrs. Gladys Finston, et al.,* Civil No. 285, filed on May 5, 1943. Jurisdiction was accepted by letter to Governor Dennis Murphree from Ralph A. Bard, Assistant Secretary of the Navy, dated January 6, 1944 and acknowledged January 9, 1944 (Exhibit 7).

4. Mississippi ceded to the United States and United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station.

5. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmen's Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—closed, Chief Petty Officers' Mess —open, Navy Exchange Enlisted Men's Club of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—open, the Commissioned Officers' Mess—closed, the Commissioned Officers' Mess—open, the Navy Exchange Enlisted Men's Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are all nonappropriated fund instrumentalities established in accordance with the pertinent regulations of the Air Force and the Navy.

6. Section 6 of the 1951 Amendments to the Universal Military Training and Service Act (50 U.S.C. App. 473) reads as follows:

The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

7. On May 4, 1964, the Secretary of Defense issued Department of Defense Directive 1330.15, which reads as follows:

Subject: Alcoholic Beverage Control.
References:

(a) Section 6, 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473.

(b) DoD Directive 1330.1, "Regulations for the Control of Alcoholic Beverages," December 17, 1953 (hereby cancelled).

(c) DoD Instruction 4175.2, "Purchase of Distilled Spirits for Resale by Military Installations which are Located in Monopoly States," April 19, 1956 (hereby cancelled).

I. AUTHORITY AND PURPOSE

Under the authority contained in reference (a) this Directive assigns responsibility and establishes uniform Department of Defense policy governing the sale of alcoholic beverages.

II. APPLICABILITY AND SCOPE

The provisions of this Directive apply to all DoD components and to all persons eligible to patronize on-base outlets selling alcoholic beverages in the United States and the District of Columbia.

III. RESPONSIBILITY

A. OFFICE OF THE SECRETARY OF DEFENSE

The Assistant Secretary of Defense (Manpower) (ASD(M)) shall be responsible for the administration of this Directive throughout the DoD.

B. MILITARY DEPARTMENTS

The Secretaries of the Military Departments shall be responsible for effectively carrying out the policies of this Directive and to make and issue implementing regulations in accordance with existing applicable laws.

IV. GENERAL POLICY STATEMENTS

A. USE OF ALCOHOLIC BEVERAGES

The established policy of the Department of Defense with respect to controlling the use of alcoholic beverages by members of the Armed Forces is to encourage abstinence, enforce moderation, and punish over-indulgence. This policy can be carried out most effectively through command supervision.

B. RESTRICTIVE CONTROLS AND AFFIRMATIVE MEASURES

1. Restrictive controls shall be established by Secretaries of the Military Department which recognize (as the primary consideration) the varying conditions and requirements of military service, yet do not discriminate against individuals in the Armed Forces by denying them the rights and privileges of other citizens.

2. Affirmative measures shall be taken, including but not limited to providing (*a*) character guidance, with emphasis on the harmful effects of the immoderate use of alcoholic beverages, using the advice and assistance of chaplains, and (*b*) wholesome recreation, entertainment, and relaxation for individuals in the Armed Forces both on and off station, using the initiative and assistance of local communities and national organizations.

C. COOPERATION

1. DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all

alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, without regard to prices locally established by state statute or otherwise.

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

V. AUTHORIZED SALES

A. OTHER THAN PACKAGED ALCOHOLIC BEVERAGES

Appropriate regulations controlling the sale of alcoholic beverages dispensed by the drink, or beer sold in other than sales outlets for packaged alcoholic beverages, may be promulgated by the Secretaries of the Military Departments.

B. SALES OUTLETS FOR PACKAGED ALCOHOLIC BEVERAGES

The sale of packaged alcoholic beverages, other than beer, may be authorized on military installations when the Secretary of a Military Department approves the establishment of such sales outlets after determining that the authorization will be beneficial to the morale of the military community.

1. In arriving at such determinations, the Secretary of a Military Department will take cognizance of all pertinent factors including the following criteria as applicable:

(a) Estimated number of authorized patrons per outlet if granted.

(b) Importance of estimated contributions of package store profits to providing, maintaining and operating clubs, messes and other recreational activities.

(c) Availability of wholesome family social clubs to military personnel in the local civilian community.

(d) Geographical inconveniences.

(e) Limitations of non-military sources.

(f) Disciplinary and control problems due to restrictions imposed by local law and regulation.

(g) Highway safety.

(b) A digest of the attitudes of community authorities or civic organizations toward establishment of a package sales outlet.

2. An information copy will be dispatched to the ASD (M) of each action approving the establishment of sales outlets for packaged alcoholic beverages, including the determinations and findings made in accordance with the criteria as stated above.

3. Controls

(a) Purchase and consumption

Although individual rationing will not be required, installation commanders will maintain a continuing review of the amount of alcoholic beverages purchased in the sales outlets and the number of authorized purchasers. If such review indicates that the purchases equated to the number of authorized individuals results in an excessive per capita amount, appropriate control measures will be instituted to assure compliance with Section IV.A or V.B.3.c. as applicable.

(b) Pricing

Prices in authorized sales outlets for packaged alcoholic beverages shall be within ten per cent (10%) of the lowest prevailing rates of civilian outlets in the area. Exceptions will be granted only upon approval by the Secretary of the cognizant Military Department upon a substantiated showing, to be made in each case, that special factors warrant an exception thereto.

(c) Diversion

Diversion, to unauthorized persons of packaged alcoholic beverages purchased by members of the Armed Forces in authorized sales outlets, is a serious offense and where substantiated will be punished.

4. Eligibility for patronage of sales outlets

Eligibility for patronage of sales outlets for alcoholic beverages on military installations will be restricted to authorized personnel prescribed by the Secretaries of the Military Departments.

VI. IMPLEMENTATION

Within thirty (30) days from the date of this Directive, the Secretaries of the Military Departments shall submit to the ADS (M) for approval their proposed implementing regulations.

VII. CANCELLATIONS

References (b) and (c) are cancelled.

8. On June 9, 1966, the following change 1 to Directive 1330.15 was issued:

> The following pen change to DoD Directive 1330.15, 'Alcoholic Beverage Control,' May 4, 1964, has been authorized, *effective immediately:*
>
> *PEN CHANGE* to *Page 2, Section IV.C.1:* Delete the last clause reading as follows: 'without regard to prices locally established by state statute or otherwise.'

9. The following memoranda and letter are certified true copies from the official files of the Department of Defense relating to said Directive of June 9, 1966:

(a) Memorandum For Secretaries of the Military Departments from Thomas D. Morris, Assistant Secretary of Defense (Manpower), dated April 15, 1966 (Exhibit 8);

(b) Memorandum For: Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966 (Exhibit 9);

(c) Memorandum For: Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966 (Exhibit 10);

(d) Memorandum For The Assistant Secretary of Defense (Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966 (Exhibit 11);

(e) Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966 (Exhibit 12);

(f) Memorandum for The Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966 (Exhibit 13);

(g) Memorandum For The Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966 (Exhibit 14);

(h) Letter to Mr. Charles B. Buscher, Executive Di-

rector, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966 (Exhibit 15).

10. Mississippi's Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265-01 *et seq.*, enacted July 1, 1966, a true copy of which is attached hereto as Exhibit 16, imposes regulatory control of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

11. The Alcoholic Beverage Control Division promulgated Regulation No. 22, entitled "Sales to Military Post Exchanges, etc., Effective September 1, 1966," which reads as follows:

REGULATION No. 22

SALES TO MILITARY POSTS EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%.

This was reissued, without substantial change in content, as Regulation No. 30, dated September 14, 1970.

12. The nonappropriated fund instrumentalities enumerated in Paragraph 6, hereof, elected to purchase all of

their alcoholic beverages directly from distillers or suppliers. Under protest, but pursuant to Regulation No. 22 (now Regulation No. 30), they paid the aforementioned markups to the distillers and/or suppliers, and said distillers and/or suppliers collected the markups and remitted them directly to the Mississippi Alcoholic Beverage Control Division.

13. The Alcoholic Beverage Control Division maintains a wholesale warehouse for the distribution of alcoholic beverages as a service to purchasers. The wholesale services and facilities are available both to the military and other purchasers. The Division is required by law to maintain these facilities whether they are utilized or not. In instances where the nonappropriated fund instrumentalities listed the Paragraph 6, hereof, make purchases of alcoholic beverages direct from distillers located outside the State of Mississippi with shipment being made direct to said organizations, the Division does not transport, store, distribute or perform any other direct service connected with the purchases.

14. By letter dated May 23, 1967 addressed to "All Firms Selling Alcoholic Beverages to the State of Mississippi," the Mississippi Alcoholic Beverage Control Division informed such firms as follows:

> Subject: Sales to Military Post Exchanges, Ship Stores and Officers Clubs.
>
> You are hereby advised that the following Regulation issued under authority granted by HB 112, laws of 1966, *has not been suspended or amended,* therefore, all provisions remain in force and shall be strictly adhered to:
>
> REGULATION No. 22
>
> SALES TO MILITARY POST EXCHANGES, ETC.
> EFFECTIVE SEPTEMBER 1, 1966
>
> Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an

order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%."

Any supplier who fails or refuses to strictly observe the above Regulation shall be considered as having violated the Alcoholic Beverage Control laws of Mississippi and promptly deprived of the benefits of same; and in addition thereto may be prosecuted for violating the act and subject to the penalties set forth therein.

Submitted by:

/s/ A. V. BEACHAM, M.D.,
A. V. BEACHAM, M.D., *Director.*

cc: Commanders of Military Posts located in Mississippi

(Underscoring so in original).

15. By letter dated June 8, 1967, addressed to "Alcoholic Beverage Suppliers," on the subject of "Compliance With Alcoholic Beverage Control Regulation No. 22—Sales To Military Officers Clubs, Post Exchanges, Ships Stores, Etc.," the Mississippi Alcoholic Beverage Control Division informed such suppliers as follows:

Gentlemen: The mark-up regulatory fee required by the subject regulation must be remitted directly to this Division on the date shipments are made to the Military base. Said fee must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base. Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without immediately remitting the fee directly to the Alcoholic Beverage Control Division of

the State Tax Commission and collecting said fee directly from the said Military organization shall be in violation of the Alcoholic Beverage Control laws and regulations issued pursuant thereto. Payments by the Military organizations into an escrow account in lieu of payment to the suppliers have not been approved by the State of Mississippi and any such payments permitted by the suppliers shall subject such suppliers to penalties as provided by law and regulations. In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division *will be delisted.*

If this letter is not completely and perfectly clear we strongly suggest that you contact this office prior to accepting further orders.

Yours very truly,

/S/ A. V. BEACHAM, M.D.,
A. V. BEACHAM, M.D., Director,
Alcoholic Beverage Control Division,
State Tax Commission.

AVB:am
(Underscoring so in original).

16. The Alcoholic Beverage Control Division initially sought to require the said nonappropriated fund instrumentalities to obtain an alcoholic beverage permit from the Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi. After their refusal to obtain such permit, the Division made no further effort to enforce this requirement.

17. The amount of the markups paid by the affected nonappropriated fund instrumentalities to suppliers outside the State of Mississippi and remitted by them to the Mississippi Alcoholic Beverage Control Division has totalled $648,421.92 from September 1966 through July 31, 1971.

18. The following Directives, Regulations and Manuals govern the operation of the clubs and other nonappropriated fund instrumentalities of the Air Force and Navy:

Department of Defense Directive No. 1330.15 dated May 4, 1964, as revised June 9, 1966, and applicable to the nonappropriated fund instrumentalities of all military departments (Exhibit 17);

Air Force Regulation 34-57, dated December 22, 1970, entitled, The Control of Alcoholic Beverages: Their Procurement, Sale and Use, with Change 1, dated March 25, 1971 (Exhibit 18);

Air Force Regulation 176-1, dated July 30, 1968, entitled, Nonappropriated Funds: Basic Responsibilities, Policies, and Practices, with Changes 1, 2, 3, 4, 5, 6, and 7 (Exhibit 19);

Air Force Manual 176-3, dated May 12, 1971, entitled Nonappropriated Funds: Operational Manual for Open Messes and Other Sundry Associations (Exhibit 20);

Navy regulations contained in the Manual for Messes Ashore, 1962, with Changes 1 through 6 (NAVPERS 15951) (Exhibit 21.).

19. The net profits earned by the aforesaid nonappropriated fund instrumentalities listed in Paragraph 6 of this stipulation, from the sale of alcoholic beverages for the calendar year 1969 and fiscal year 1971, and the use made thereof, were as follows:

(1) *Keesler Air Force Base:* Officers' Open Mess: 1969—$51,542.10; 1971—$12,554.78. Used for general maintenance of the club. NCO Open Mess: 1969—$55,348.55; 1971—$20,684.08. Used for general maintenance of the club and purchase of equipment.

(2) *Columbus Air Force Base:* Officers' Club: Fiscal year 1970, with beer sales included, $11,732.62; 1971—$12,654.43. Used for general maintenance of the club. NCO club: 1969—$23,241.23. Used for the general maintenance of the club. 1971—$15,864.87. Put into special reserve fund for major improvements and decorations.

(3) *U.S. Naval Construction Battalion Center:* Commissioned Officers' Mess—closed: 1971—$1,977; Chief Petty Officers' Mess—open: 1971—$17,048. Put into clubs' reserve funds and used for additions and improvements to the clubs. Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $8,113; Enlisted Mens' Club (Bar sales), $20,027. Profits were held for the club for entertainment, refurbishment and similar purposes for improving the club.

(4) *Naval Air Station, Meridian:* Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $4,370; Enlisted Mens' Club (Bar sales), $12,838. Profits are held for the club for entertainment, refurbishment and

similar purposes for improving the clubs; CPO Mess: 1969—$4,755.29; 1971—$6,204. Profits used to help pay wages and other mess administrative expenses; Commissioned Officers' Mess open: 1969—$14,154.45; 1971—$8,620. Put in club's reserve fund and used for additions and improvements to the club.

21. The following Interrogatories to the Plaintiff and the Plaintiff's Answers thereto:

"5. What, if any, reason exists why the personnel at the four military bases named in paragraph 6 of the complaint cannot supply their legitimate needs for packaged liquor by purchases from retail stores licensed by the State of Mississippi?

Answer. The nature and characteristics of military service and the circumstances and conditions governing such service cause Armed Forces personnel and their families to form their own community on the military installation and to remain separated from the surrounding civilian community. Members of the Armed Forces are subject to military discipline. Their place of duty assignment and hours of duty are fixed on the basis of the needs of the service and not upon personal preferences of the individual. Because they share the same outlook and the same working and living conditions, Service families look to each other and to the installation to which they are assigned for the satisfaction of their duty and off-duty needs.

The clubs, including their packaged liquor stores, furnish a necessary and important service to Armed Forces personnel and their families. They provide convenient facilities for off-duty dining, entertainment, relaxation and amusement. To the military community, they are the counterparts of similar facilities that are available to civilians in the civilian community.

Because they are conveniently located, are oriented to the special needs and circumstances of Service families, and are a particular earmark of military life, they contribute to the establishment and maintenance of Service morale and esprit de corps."

"6. What if any, reason exists why the alleged Federal instrumentalities named in paragraph 6 of the complaint cannot supply the legitimate needs of the aforesaid personnel without avoiding payment of the

wholesale markup on packaged liquor required by the State of Mississippi as to all packaged liquor sold in the State?

Answer: Members of the Armed Forces are stationed at installations and transferred therefrom as the needs of the Service dictate, and not on the basis of personal preferences. Because of these circumstances, it is desirable from a morale standpoint that each installation furnish substantially similar off duty facilities for its military community, including clubs, packaged liquor stores, etc. This policy aids in easing the burden and inconvenience of transfers of personnel from one installation to another.

The 17 or 20 per cent wholesale mark up on liquor in Mississippi has a substantial effect on the price at which it can be sold on the installation. No other State has such a requirement. If the wholesale mark up is paid by clubs at installations in Mississippi, their resale prices would be higher than at clubs located on installations in other States throughout the country. It would be one factor which would make service at installations in Mississippi less attractive than in other States and would detrimentally affect the morale of Armed Services personnel transferring to installations in the State of Mississippi."

/s/ Meyer Scolnick
MEYER SCOLNICK
Attorney for the Plaintiff, United States of America.

/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General for the State of Mississippi.

/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorney for Defendant, State Tax Commission of the State of Mississippi.

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

[seal]

15 April 1966

MANPOWER

MEMORANDUM FOR Secretaries of the Military Departments

Recently, at their request, I conferred with the representative of the Association of Control States and members of the State Control Boards of several States. Mr. Charles B. Buscher, Executive Director of the National Alcoholic Beverage Control Association, Inc., requested that the Department of Defense policy concerning control of alcoholic beverages be changed to provide that military installations located in Control States would purchase their alcoholic beverages from the State wholesale distributors. He stated that all of the Control States except Montana and Oregon have now amended their laws to permit a discount to the military installations. This was strongly endorsed by all of the State representatives present at the meeting, and assurances were given that they would negotiate with the military installation representative and agree to a price which would result in a fair and reasonable profit to the installations. This was urged as a means of effecting better control of alcoholic beverages in their States and minimize alleged diversion to unauthorized persons.

It was also brought out at the hearing that a bill had been submitted by the Association and introduced in Congress which would compel the installations in the Control States to purchase the liquor from these States. They further stated that they would much prefer to work out an agreement with the Defense Department as indicated above rather than press for the bill. Failing to secure such agreement, they indicated that they would seek to have the bill passed by the Congress and said they were confident that sufficient support could be elicited to attain passage. After a full discussion, I advised them that I would look into the matter further.

Before any conclusion is made with respect to this proposal, I would appreciate your comments on the following statement which if approved will be reflected in the present DoD Directive.

"In all of the seventeen (17) Control States, frequently referred to as Monopoly States, except Montana and Oregon, military installations located within such States having separate package liquor stores on said installations will not purchase alcoholic beverages from any source other than the State wholesale distributors until they have contacted the appropriate officials within the State and undertaken negotiations as to price. If a mutually agreed upon price has been arrived at, the installations will purchase their alcoholic beverages exclusively from the State. Where there is no package liquor store on an installation, the foregoing is optional and the purchases may be made from other sources providing deliveries can be made to the installation in consonance with the law.

Since price is only one factor in determining the most advantageous contract for the Government, a price which is mutually agreed upon and which results in an adequate profit to the installation is a satisfactory implementation of the policy of Section IV.C.1 of DoD Directive 1330.15 even though a lessor price might be secured from a private source outside of the State involving inconvenience inherent in transactions and shipments from a distant source."

Your comments are requested not later than 22 April 1966.

Thomas D. Morris

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20350

[seal]

22 April 1966

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

Subj: Proposed change to Department of Defense Directive No. 1330.15 (Alcoholic Beverage Control)
Ref: (a) ASTSECDEF (Manpower) memo of 15 Apr 1966
Encl: (1) Purchasing of distilled spirits from monopoly states
(2) Potential additional costs to Navy and Marine Corps Messes in Maine, New Hampshire, North Carolina, Pennsylvania, and Virginia

Reference (a) advised that the National Alcoholic Beverage Control Association had requested that the Department of Defense require that military activities in control states (the seventeen "monopoly" states) purchase their alcoholic beverages from the State liquor authorities. It was alleged that this would result in better control of alcoholic beverages in these States and minimize alleged diversion to unauthorized persons.

This Association has made similar requests several times in the past. However, in sympathy with strong objections from the military services, acquiescence has not been granted. The Secretary of the Navy again objects to submitting to the request of this Association, the membership of which is composed of ABC Board members in the seventeen control states. Furthermore, it is highly doubtful that legislation subjecting Federal Government instrumentalities to the state controls proposed by the Association would advance any further this year than it has in past years.

In accordance with sound business practices, most Navy Messes and Clubs have for over thirty years been purchasing their alcoholic beverage requirements directly from prime sources, the distillers. Distillers' representatives make frequent calls, give advice and assistance, and expedite shipments directly from the factory or regional warehouses. Prices are at or near the minimum prices paid by

the control states, and these very reasonable prices apply to all orders regardless of size. It would be impossible to have any lower prices or any more convenient method of purchase than this.

Military activities enforce strict regulations to preclude diversion to unauthorized purchasers. The decalcomanias provide positive identification of each and every bottle; the signed sales slip with pledge not to resell is a further check. The 1964 DOD regulation establishing military package store sales prices within 10% of outside prices further minimizes the temptation to engage in illicit commerce. There is no evidence that there are any better "controls" in the States of Oregon, Washington, and Michigan (where we are now forced to buy from State stores) than elsewhere. On the contrary, those States exact a markup of from 30 to 70% over the cost to military activities elsewhere. This increases the operating costs of the Messes and Clubs in those States by a tremendous amount. The results are high prices of drinks and packaged goods to military personnel, lack of profits for Mess maintenance and improvements, and a deleterious effect upon military morale.

Enclosure (1) delineates today's purchasing procedures in the control states, based upon data provided by the Distilled Spirits Institute. Discounts to the military from the State store retail price are: Michigan, 22% and without tax of 8%; Oregon, none; Washington, 27%. Thus, the net markups over costs to State stores imposed upon military Messes are estimated to be: Michigan, about 30%; Oregon, about 70%; and Washington, about 45%.

If it were assumed that we could reach price agreements with the other five control states in which Navy and Marine Corps activities are located and if these State Control Boards offered a markup of only as little as 30%, the additional annual costs to the fourteen Navy and Marine Corps activities in the five states would exceed $2,750,000. Refer to enclosure (2).

In summary, it is recommended that the proposed change to DOD Directive No. 1330.15 not be made and that the pressures from the National Alcoholic Beverage Control Association continue to be resisted strongly. Military Mess purchasing methods of long standing are in accord-

ance with the free enterprise system, sound business practices, and DOD purchasing policies. The proposed change would provide no advantages to the military. The increased costs would be extremely detrimental to morale.

/s/ Robert H. B. Baldwin
ROBERT H. B. BALDWIN
Under Secretary of the Navy

Purchasing of Distilled Spirits from Monopoly States

State	State Liquor Board Markup on Cost	Discount to retail licensees	How Purchased Now by Military Activities
Alabama	68.0%	5%	Shipments to military from outside state are permitted.
Idaho	66.5%	5%	Unknown.
Iowa	50.9%	?	Shipments to military from outside state are permitted.
Maine	45.5%	?	Navy receives all shipments from outside state. No objections.
Michigan	63.2%	12½% not including 8% tax	Military activities must buy from State liquor stores. Discount is 22% not including 8% tax.
Montana	60.5%	?	Unknown.
New Hampshire	32.1%	5%	Navy receives all shipments from outside state. No objections.
North Carolina	42.5%	No on-sale licenses	Shipments to military from outside state are permitted.
Ohio	50.3%	10%	Shipments to military from outside state are permitted.
Oregon	69.5%	?	Military activities must buy from State liquor stores, with standard markup and no discount at all.
Pennsylvania	79.4%	16⅔%	Navy receives all shipments from outside state. No objections except for one small base which is not fully ceded.
Utah	62.0%	No on-sale licenses	Shipments to military from outside state are permitted.
Vermont	38.4%	2%	Shipments to military from outside state are permitted.
Virginia	44.0%	No on-sale licenses	Navy receives all shipments outside state. No objections.
Washington	77.0%	17.5%	Military activities must buy from State liquor stores. Discount is 27%.
West Virginia	59.0%	No on-sale licenses	Shipments to military from outside state are permitted.
Wyoming	19.1%	?	Shipments to military from outside state are permitted.

Enclosure (1)

Potential Additional Costs to Navy and Marine Corps Messes in Maine, New Hampshire, North Carolina, Pennsylvania, and Virginia

Maine	$59,445
New Hampshire	66,015
North Carolina	406,445
Pennsylvania	426,186
Virginia	1,827,904
	$2,785,995

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C. 20310

[seal]

26 April 1966

MEMORANDUM FOR: ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

SUBJECT: Alcoholic Beverage Procurement

This memorandum provides comments on the changes to DOD Directive 1330.15 proposed in your memorandum of 15 April 1966, which would encourage procurement of alcoholic beverages by the military services from wholesale distributors of the Control or Monopoly States, except Montana and Oregon.

The net effect of the policy change would be to encourage procurement of alcoholic beverages in fifteen (15) states, at prices established by the states, instead of in a competitive, free market. This would reduce the margin of allowable profit accruing to officers' and NCO open messes, or otherwise require selling price increases. The proposal is contrary to the current policy that procurement by nonappropriated fund activities shall be in the open market, to the best advantage of the procuring activity, and by a method of purchase deemed to be the most favorable to the Government. There would be no objection to a provision whereby the wholesale distributors of Control (Monopoly) States would be given the opportunity to quote prices in free competition with private supply sources.

It is strongly recommended that the proposed change to DOD Directive 1330.15 quoted in your memorandum not be adopted. As an alternative, the following change is proposed:

> "It is the policy of the Department of Defense that alcoholic beverages procured for sale and consumption in authorized resale outlets pursuant to this Directive, be procured at the lowest prices, irrespective of source, consistent with the preferences of authorized patrons. Additional transportation and handling costs of procurement from a distant supply source, should be con-

sidered in order to insure that the landed cost at the point of sale is in fact the lowest cost of goods sold.

"Procurement officers within the United States will obtain quotations from the wholesale distributors of Control (Monopoly) States in which delivery is to be made, in determining the most advantageous source of alcoholic beverages procured for sale and consumption at Armed Services installations."

/s/ Arthur W. Allen, Jr.
ARTHUR W. ALLEN, JR.
Deputy Under Secretary of the Army
Manpower

DEPARTMENT OF THE AIR FORCE

WASHINGTON

OFFICE OF THE UNDER SECRETARY

April 26, 1966

MEMORANDUM FOR THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

SUBJECT: Procurement of Alcoholic Beverages in Control States

Reference is made to your memorandum of 15 April 1966 concerning the above subject.

The proposed addition to DOD Directive 1330.15 strongly implies that non-appropriated fund activities should buy alcoholic beverages from state wholesale distributors in the specified states even though their prices may be higher than prices on the open market. Economically operated open messes are among the most important fringe benefits which contribute to our retention program.

The Air Force opposes any directive which would restrict negotiating for the best possible price consistent with the laws of the various control states. We believe that DOD should take no action to limit the gains which could accrue to the best advantage of non-appropriated fund activities, including open messes. In its' non-appropriated fund procurements the Air Force, as a general rule, prefers to follow the Armed Services Procurement Regulation policy of maximum competition. We believe that the proposed addition to the Directive would not be consistent with the principle that all procurements should be on a competitive basis to the maximum practicable extent.

At the present time there are differing agreements with the various states. In some instances states permit the Air Force non-appropriated fund activities to make the most profitable arrangements for the purchase of alcoholic beverages from wholesalers. Others are much more limiting and it appears that the Association of Control States desires to impose greater limitations and to force us to buy from the control states even when their prices are not competitive.

We believe the proposed directive would confuse the issue and set the stage for further controversy.

We recognize that the proposed directive is designed to prevent legislation which would require our non-appropriated fund activities to purchase from certain state wholesalers regardless of price. We do not believe the revised directive would over a long period of time preclude an attempt at such legislation. Nevertheless, if legislation is pursued by the interested states, the DOD should oppose it. There is a good chance the legislation will not be pursued, or if pursued, will not be enacted.

For the above reasons, the Air Force believes the proposed statement should not be incorporated into DOD Directive 1330.15.

/s/ Norman S. Paul
NORMAN S. PAUL
Under Secretary of the Air Force

ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

3 May 1966

[seal]

MANPOWER

MEMORANDUM FOR MR. MORRIS

SUBJECT: Proposal of the Control States Association

In view of the strong opposition of the Department of the Navy and Air Force, it is recommended that this office not approve the proposal submitted to the Military Departments for coordination by this office. While the Army's report also opposes the proposal as submitted, it does recommend a substitute. While this counter-proposal is a satisfactory one, if it were decided to make such a change in the Directive, it would undoubtedly meet the same opposition from the other Departments as the proposal that was sent to them for coordination.

As an alternative, it is recommended that the Directive be changed to delete the last clause in Section IV.C.1 of the Directive which states, ". . . without regard to prices locally established by state statute or otherwise." As you recall, this clause was specifically objected to by the Chairman of the Pennsylvania Alcoholic Beverage Control Board. Its deletion would not require negotiation with the Monopoly States' authorities nor would it preclude it. If you agree, I think we could expeditiously get at least a "no objection" from the other Military Departments. I have discussed this, together with other factors involved, with General Lampert and he concurs in this suggestion, subject to your approval.

If you approve, I will prepare the necessary papers to effect this, including a letter to Mr. Buscher.

/s/ Steve
STEPHEN S. JACKSON

8 JUN 1966

MEMORANDUM FOR THE DEPUTY SECRETARY OF DEFENSE

Several representatives of the Control States Association and the Executive Director of the National Alcoholic Beverage Control Association met with me recently at their request. All of the members complained of alleged diversion of alcoholic beverages to unauthorized persons in their states. They urged that the Department of Defense require that military installations located in Control States purchase their alcoholic beverages exclusively from the state wholesale distributor. They pointed out that 15 of these states had modified their laws to give discounts to the military and that they would negotiate and agree to prices which would result in a fair and reasonable profit to the installations. This was advocated as a means of effecting control and preventing diversion. It was proposed as an alternative to legislation submitted by them to Congress which would require all purchases to be made from the Control States. Although alleging widespread diversion, they declined to give information which would permit an investigation and appropriate action if substantiated.

I sent a memorandum to the three Secretaries emphasizing the necessity of persistent monitoring of the DoD policy and Service regulations designed to prevent diversion to unauthorized persons.

This was followed by a memorandum from this office outlining the proposal and requesting comments. The Air Force and the Navy reported unqualified opposition to it. The Army objected to it but proposed an alternative which would require procurement officers for installations within the Control States to obtain quotations of prices which would be considered along with the prices from other sources.

In lieu of the proposal submitted to the Department, I suggest the following change in our Directive, a copy of which is attached. On page 2, Section IV.C.1, delete the last clause, ". . . without regard to prices locally established by state statute or otherwise." While I am sure the Control States would want to go much further, this lan-

guage was particularly objected to by the Chairman of one of the Alcoholic Beverage Control Boards.

Its deletion would not require nor would it preclude negotiation with the states for the most advantageous contract to the Government.

Informal coordination with the three Departments resulted in approval by Navy and Air Force. The Army non-concurs on the basis that deletion could be misunderstood and might result in litigation. AGC(M) has no objection to the suggested change to the Directive. He notes that the legal posture of DOD would not be affected.

Recommend signature of the attached memorandum.

Thomas D. Morris

Attachments
2nd page revised by LtGenJBLampert/vlm/7Jun66
cc: OASD(M) Files
ASD(M)

9 JUN 1966

MEMORANDUM FOR The Assistant Secretary of Defense (Administration)

SUBJECT: Deletion of Clause in DoD Directive 1330.15, May 4, 1964

Please amend DoD Directive 1330.15 by making the following deletion:

Page 2, Section IV.C.1, the last clause

"without regard to prices locally established by state statute or otherwise."

This change is effective immediately. Action addressees should be requested to submit two copies of revised implementing regulations to the Assistant Secretary of Defense (Manpower) within thirty days.

Deputy

27 JUN 1966

Mr. Charles B. Buscher
Executive Director, National Alcoholic
Beverage Control Association
1000 Connecticut Avenue
Washington, D. C. 20036

Dear Mr. Buscher:

I regret the delay in sending this letter due to matters of paramount importance, including a trip to South Vietnam.

Since my conference with you and the members of your Association, I have studied the comments of the military departments on the proposal recommended by your group. I have also given careful consideration to the allegations of widespread diversion to unauthorized persons of alcoholic beverages purchased at military outlets.

As to the matter of diversion, I can assure you that this is a matter of continuing supervision in all of the military departments through the chain of command from the Secretary to the field. I know that the Secretaries of the military departments have recently addressed themselves to this matter of possible diversion. I am enclosing a recent Newsletter from the Navy. I should point out that we can act on specific allegations of diversion by authorities of an Alcoholic Beverage Control Board only if such details are revealed that would permit Departments to take appropriate action.

As to your proposal, the opposition from the Services is such as to convince me that its adoption is not in the best interest of the military departments.

However, in our desire to cooperate with the sovereign states of the Control Group, we have decided to delete the last clause in Section IV.C.1. of DoD Directive 1330.15 (attached). This would meet the specific objection of your group as submitted by the Chairman of the Pennsylvania ABC Board. It would also remove any possible implication that negotiation with a state official must be avoided.

Sincerely,
Thomas D. Morris

SSJackson/gsc/jg/18 Jun 66
3D-281/79158

Enclosures
(M) Chron File
(M) Reading File
Mr. Jackson

SUPREME COURT OF THE UNITED STATES

No. 72-350

UNITED STATES, APPELLANT,

v.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

APPEAL from the United States District Court for the Southern District of Mississippi.

The statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted.

November 13, 1972

☆ U.S. Government Printing Office: 1973—492-475/429

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*, pp. 1a–23a) is reported at 340 F. Supp. 903.

JURISDICTION

The judgment of the three-judge district court (App. B, *infra*, p. 24a) was entered on March 30, 1972. A notice of appeal to this Court (App. C, *infra*, pp. 25a–26a) was filed on May 1, 1972. On June 22, 1972, Mr. Justice Powell extended the time for docketing the appeal to and including August 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

The government instituted this action seeking: (1) a declaration that a statewide regulation was void because unconstitutional, (2) an injunction against state officials restraining the regulation, taxation, or control of purchases of alcoholic beverages by instrumentalities of the government, and (3) a judgment for the amount previously paid under protest pursuant to the challenged regulation. Accordingly, a three-judge district court was properly convened pursuant to 28 U.S.C. 2281, *King* v. *Smith,* 392 U.S. 309, 312 n. 3, and a direct appeal to this Court is authorized by 28 U.S.C. 1253.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers and suppliers to collect "wholesale markups" on liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within Mississippi and to remit these "markups" to the Tax Commission. The questions presented are:

1. Whether Mississippi can apply this regulation with respect to military bases over which the jurisdiction of the United States is exclusive; and

2. Whether, with respect to military bases over which federal and state jurisdiction is concurrent, the regulation imposes an unconstitutional state tax on the government or is an unconstitutional interference with military procurement.

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATION INVOLVED

Article I, section 8 provides in part:

> The Congress shall have Power * * *

To raise and support Armies, * * *

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

* * * * *

To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

Article IV, section 3 provides in part:

To exercise exclusive Legislation in all Cases and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Section 2 of the Twenty-first Amendment provides:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 10265–18(c) of the Mississippi Local Option Alcoholic Beverage Control Law provides:

The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic beverage, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at wholesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission

may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act.

Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.
>
> All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the

State Tax Commission monthly covering shipments made for the previous month.

STATEMENT

The material facts are not in dispute.[1] Mississippi prohibited the sale or possession of alcoholic beverages until 1966. In that year, it adopted a local (county) option policy subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages. Miss. Code Ann. 10265–01, *et seq.* The Commission was authorized to sell to retailers in the state "including, at the discretion of the Commission, any retail distributors operating within any military post * * * within the boundaries of the State * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes of this act." Miss. Code Ann. 10265–18(c).

Pursuant to this statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. The regulation requires, on direct orders from such military facilities, that distillers collect and remit to the Commission the Commission's "usual wholesale markup." During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine (App. A, p. 4a).

[1] The case was submitted on a stipulation of facts (App. D, *infra*, pp. 27a–44a).

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on four military bases in Mississippi had purchased liquor from distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (App. D, p. 37a). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are enclaves of federal jurisdiction over which Mississippi retained only the right to serve civil and criminal process. Miss. Code Ann. 4154 (App. A, pp. 3a, 7a). On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the State exercise concurrent jurisdiction (App. A, p. 3a; App. D, p. 29a).

Soon after the Mississippi regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the "markup" was improper. The military authorities also attempted to pay the amounts for the "markup" into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the "markups" on their military sales to the Commission, the distillers would be subject to criminal prosecution (see Miss. Code Ann. 10265–112) and to delisting, *i.e.*, loss of the privilege of selling to the Commission for retailing in Mississippi (App. D, pp. 38a–40a). To obtain liquor, therefore, the military facilities were required by the distillers to pay the "markup." By July 31, 1971, $648,-

421.92 had been paid under protest to suppliers outside Mississippi for such "markups" (App. D, p. 40a).

The United States instituted this action on November 3, 1969, seeking a declaration that the regulation is unconstitutional and an injunction against its continued enforcement, and seeking to recover the amount already paid for "markups."

The district court granted summary judgment against the government. It held that the constitutional grants to Congress regarding military forces and property belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (App. A, p. 2a). With respect to liquor sold by the drink on the four bases, the court made no express holding, but its judgment denied all relief to the government. Judge Cox joined the court's opinion and added in a concurring opinion that a refund of the "markup" was also barred because those payments had been voluntarily made (App. A, pp. 13a–23a).

THE QUESTIONS ARE SUBSTANTIAL

The district court's decision squarely presents a substantial issue: whether the constitutional grants of congressional authority over enclaves of exclusively federal jurisdiction are diminished by the Twenty-first Amendment. In addition, the enforcement of Mis-

sissippi's regulation as it affects the military facilities on all four bases raises substantial questions concerning the accommodation of state authority under the Twenty-first Amendment, on the one hand, with governmental immunity from state taxation and federal control of military procurement, on the other hand. The resolution of these issues has significant practical importance not only in Mississippi, which has already collected over $648,000 pursuant to the contested regulation, but also in other states that might follow Mississippi's lead in attempting to regulate liquor sold on federal enclaves or military bases.

1. Section 2 of the Twenty-first Amendment prohibits the "transportation or importation" of liquor "into any State * * * for delivery or use therein" in violation of state law. This Court has held the Amendment inapplicable to liquor destined for and sold within exclusively federal enclaves. *Collins* v. *Yosemite Park Co.*, 304 U.S. 518; *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383.[2]

The court below correctly recognized that the Twenty-first Amendment did not increase a state's territorial jurisdiction and that as federal enclaves the Keesler and Naval Construction bases "are to Mississippi as the territory of one of her sister states"

[2] Article IV, section 3, gives Congress the power to regulate federal enclaves, and Article I, section 8, clause 16, gives Congress authority "To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * *."

(App. A, p. 7a). The court nevertheless held that, because some undetermined amount of liquor purchased by the military and sold on the bases is consumed in Mississippi,[3] the State could under the Twenty-first Amendment impose the "wholesale markup" charge on *all* liquor purchased by the facilities.

This holding rests on two faulty premises: that the transaction between the distiller and the military facility involves importation "into any state," and that the liquor thus imported is "used" in Mississippi, within the meaning of those terms of the Twenty-first Amendment. This Court in *Collins* v. *Yosemite Park Co., supra,* held that the importation of out-of-state liquor for delivery and sale within Yosemite National Park was not importation "into California within the meaning of the Twenty-first Amendment" (304 U.S. at 535). See also *Johnson* v. *Yellow Cab Co., supra,* involving transportation of liquor through Oklahoma to Fort Sill Military Reservation. The court below sought to distinguish *Collins* on the ground that there the "delivery and use [was] in the Park" (304 U.S. at 538), whereas here the liquor is consumed off base. It is clear, however, that the "use" made of liquor by a retailer is its sale, not consumption, and

[3] Liquor sold by the drink is, of course, ordinarily consumed on the premises. The record contains nothing concerning the extent to which packaged liquor is consumed elsewhere than on the bases. The district court inferred that some of the liquor is consumed off base because limited classes of nonmilitary persons are authorized to make purchases and because each selling facility exacts from purchasers a promise to obey state laws with respect to liquor consumed off base (App. A, p. 3a).

that it was in this sense that the Court used the word in *Collins*.

The transaction between the distiller and the military facility is therefore not itself subject to regulation under the Twenty-first Amendment. Nor is there basis in this record for an assertion—not expressed by the court below—that the "markup" on the distiller-retailer transaction is the only effective means of regulating the subsequent importation and use (consumption) by individual purchasers.[5] And even if the record demonstrated such a need, it is difficult to see why that would justify an otherwise impermissible extension of Mississippi's territorial jurisdiction. Surely if the liquor were being transported from Tennessee through Mississippi for delivery and sale by retailers in Louisiana, Mississippi would not and could not impose a "markup" on those transactions simply

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[4] The record in *Collins*, like the record here, did not reveal the extent to which liquor sold on the federal lands was consumed in the state. But the complaint in *Collins* acknowledged that liquor was sold "for consumption on or off the premises where sold" (Transcript of Record, p. 3, No. 870, O.T. 1937), and there is no reason to think that some was not consumed outside the park and in California. Thus, this Court's statement in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, that the shipment in *Collins* was "destined for distribution and consumption in a national park," apparently used the word "consumption" in the broad sense of retail purchase of consumer goods.

[5] There is even less foundation for the apparent assumption of the court below that regulation of the liquor actually consumed in Mississippi requires a "markup" on all liquor purchased for sale on the bases, including liquor sold by the drink and packaged liquor consumed on the base.

because some of the liquor will be brought by individual purchasers into Mississippi for consumption. Instead, Mississippi would be limited to regulating the actual importation into the state by the individual purchasers, even if there were no fully effective means of doing so.

Likewise, Mississippi is here free under the Twenty-first Amendment to establish a regulatory mechanism to ensure that liquor actually taken from the bases is subjected to the "markup" charge. It is not free to interfere with the sale and delivery of out-of-state liquor to facilities on the federal enclaves, and the court below erred in so holding.[6]

2. Even if the court below correctly applied the Twenty-first Amendment, the "wholesale markup" charges, as they affect all four military bases, are impermissible for another reason. Although its terms suggest a price regulation, the Mississippi requirement that distillers collect "markups" of 17 or 20 percent from the military facilities and remit those

[6] Although the Twenty-first Amendment is inapplicable to liquor shipments destined for federal enclaves, Mississippi can exercise its police power to regulate such shipments while they are passing through her territory. *Duckworth* v. *Arkansas*, 314 U.S. 390; *Carter* v. *Virginia*, 321 U.S. 131. To be valid, however, such police regulation must be "in the interest of preventing * * * unlawful diversion [of the liquor] into the internal commerce of the State." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333. Here, as in *Idlewild*, there is no evidence that any liquor has been diverted, and there is no claim that such diversion is the basis of the "markup" requirement.

amounts to the State Tax Commission is a state tax on instrumentalities of the government.[7]

The "usual wholesale markup" is collected by the Tax Commission not in return for any services with respect to the liquor sold to the military facilities (App. D, p. 38a), but rather as "an enforced contribution to provide for the support of government." *United States* v. *LaFranca,* 282 U.S. 568, 572. Profits from the collection of the "markups" go into Mississippi's general revenues.[8] The regulation cannot be regarded as a tax upon the distillers rather than upon the military facilities. The regulation explicitly provides that the price to the military must include the "markup," which the distiller merely remits to the Commission. In this respect, the tax resembles the common sales or use tax that states collect through retailers, such as the tax struck down in *Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.

Accordingly, the Mississippi regulation can be sustained only if the doctrine of governmental tax immunity, which is founded upon constitutional principles, *M'Culloch* v. *Maryland,* 4 Wheat. 316, 426, is subordinate to the power of the states to regulate

[7] The officers' clubs and other nonappropriated fund activities which pay the Mississippi tax are instrumentalities of the government for purposes of the tax immunity doctrine. See *Standard Oil Co.* v. *Johnson,* 316 U.S. 481; 5 U.S.C. 2105(c).

[8] Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 4–5.

liquor pursuant to the Twenty-first Amendment. This important issue has never been decided by this Court.[9]

3. Enforcement of the regulation on military bases also presumes that the state's authority under the Twenty-first Amendment displaces the federal authority under Article I to regulate military procurement. Pursuant to Article I, Congress authorized the Secretary of Defense to regulate "the sale, consumption, possession of or traffic in" liquor to or by servicemen at or near military bases. 50 U.S.C. App. 473. Implementing this statute, 32 C.F.R. 261.4(c)[10] provides that "the purchase of all alcoholic beverages for resale at any * * * base * * * shall be in such a manner and under such conditions as shall obtain for the Government

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[9] Governmental tax immunity is not based on "a constitutional provision which flatly prohibits any State from imposing a tax * * *," as in *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 344. It is, however, rooted in the fundamental concept of federalism, *M'Culloch* v. *Maryland*, 4 Wheat. 316, 426, and is thus unlike the "generalized authority given to Congress by the Commerce Clause." *Beam*, *supra*, 377 U.S. at 344.

[10] The regulation provides:

> *Cooperation.* (1) DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered.
>
> (2) This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to State control.

the most advantageous contract, price and other factors considered."

This federal policy is impeded by the Mississippi Commission's requirement that out-of-state distillers collect 17 or 20 percent more than they otherwise would on liquor contracts negotiated with the military facilities. Unless protected by the Twenty-first Amendment, state regulations which conflict with federal military procurement regulations are invalid. See *Public Utilities Commission* v. *United States,* 355 U.S. 534; *Paul* v. *United States,* 371 U.S. 245. Thus, the decision below also raises the substantial constitutional issue, which this Court has not previously resolved, whether a state's authority to regulate liquor pursuant to the Twenty-first Amendment takes precedence over the federal authority to regulate military procurement pursuant to Article I.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1972.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, CHAIRMAN; JIMMY WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI; AND THE STATE OF MISSISSIPPI, DEFENDANTS

Filed March 24, 1972, Southern District of Mississippi.

ROBERT C. THOMAS, *Clerk.*

475-014—72——3

Before CLARK, *Circuit Judge;* RUSSELL, *Chief District Judge;* and COX, *District Judge.*

CLARK, *Circuit Judge*:

This court must harmonize the constitutional grant of power, on the one hand, to Congress to make rules for the government and regulation of the Armed Services and to legislate with regard to lands purchased for military bases with the prohibition on power, on the other hand, contained in the XXI Amendment, to transport or import intoxicating liquors into a state for delivery *or use therein* in violation of state law. Since both the affirmative and negative provisos are parts of the supreme law of the land, the relative status of the two sovereigns involved in this collision of claimed authority becomes immaterial. Rather, we must reconcile the power granted with the power prohibited. Reduced to its simplest terms, our ultimate holding is that the general article I, § 8 and article IV, § 3, clause 2 grants to the Congress of legislative and regulatory powers are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction.

The United States filed this action seeking declaratory and injunctive relief against enforcement of a statewide regulation requiring distillers and suppliers of alcoholic beverages to collect, over and above the purchase price, a percentage sum designated as a wholesale mark-up on their liquor sales to certain military organizations located on bases in the State of Mississippi. In addition, the United States sought to

recover the total of all such payments made by these military purchasers. Jurisdiction of the action is founded on 28 U.S.C.A. §§ 1345 and 2281. The matter comes on for disposition on cross motions for summary judgment based upon interrogatories and answers and a stipulation of facts.

The State of Mississippi ceded and the United States acquired exclusive jurisdiction over lands within the state comprising Keesler Air Force Base and the United States Naval Construction Battalion Center. Mississippi also ceded and the United States accepted concurrent jurisdiction over lands comprising the Columbus Air Force Base and Meridian Naval Air Station. On the premises of each of these military installations authorized personnel operate clubs, post exchanges, package stores and other similar facilities which sell packaged liquors to classes of persons delineated by military directive. These alcoholic beverages are obtained directly from distillers and suppliers located outside the State of Mississippi who ship such goods into such bases. Not only is no contention made that the consumption or use of such beverages is restricted to the military installations where purchased, but the proof shows further that: numerous classes of non military persons are authorized to make purchases; and every selling facility exacts a promise from each purchaser that he will obey the laws of the state as to such of the liquor bought as may be taken off of the installation. All of these military post facilities are operated with funds derived from dues and profits and none depends upon funds appropriated by the government of the United States.

Prior to July 1, 1966, the laws of the State of Mississippi wholly prohibited the sale or possession of alcoholic beverages in that state. On that date Missis-

sippi enacted a local option alcoholic beverage control law. *Miss. Code Ann.* §§ 10265–01, et seq (1942). This enactment imposed regulatory control over the sale of alcoholic beverages within the state in such a manner as to require all liquor purchases to be made through a state-owned warehouse. The law vested the administration of its provisions in the Alcohol Beverage Control Division of the Mississippi State Tax Commission.

This ABC Division promulgated a regulation, numbered 22 (now renumbered 30), which provides that installations selling alcoholic beverages on military reservations are to be exempted from state taxes and are given an option to order alcoholic beverages direct from the distiller, in lieu of their right under the law to make purchases from the state warehouse, but providing that in the event of the exercise of such option the direct selling distiller should collect and remit to the state the same wholesale mark-up on whiskey of 17% and on wine of 20% as charged by the state-owned warehouse.

Subsequent to the promulgation of this regulation, all distillers and suppliers of alcoholic beverages to facilities on the Mississippi bases named above collected the wholesale mark-up specified by the regulation and remitted these collections to the ABC Division of the State Tax Commission.

The plaintiff asserts that Mississippi's regulation unconstitutionally interferes with the federal procurement policy authorized by Congress and embodied in an implementing Department of Defense directive. It takes the position that Congress has conferred upon the Secretary of Defense the power to regulate the purchase, sale and use of intoxicating liquors at or

near military installations by the enactment of 50 U.S.C.A. App. § 473 which provides:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps.

and that the Secretary of Defense implemented this authorization by issuing Department of Defense directive 1330.15, (32 C.F.R. § 261.1–261.5). That directive establishes department policy governing the purchase, as well as the sale, of alcoholic beverages by all components of the Armed Services through on-base outlets. Under the heading "General Policy Statements," the directive contains a subdivision entitled "Cooperation," composed of the following paragraphs:

> 1. [The Department of Defense] will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise.*
>
> 2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control. (Emphasis supplied).

On June 9, 1966, the directive was amended by deleting the italicized words in ¶ 1.

The defendants make the following contentions. Payment of the wholesale mark-up required by the ABC regulation does not unduly burden the military function. Since mark-ups were passed on to customers and no assignment has been obtained from these customers to the United States, no damage claim can be maintained by it. Congress, in enacting § 473, did not intend to confer upon the Department of Defense the right to create regulations for the *purchase* of packaged liquor contrary to state law, but rather intended only to authorize liquor sales and use regulation at or near bases. The 1966 amendment to the Department of Defense directive was intended to clarify the state's right to control prices. The federal government should not have the status of a sovereign to sell liquor since such sales are not a function of sovereignty. All federal interests were acquired at times when Mississippi law forbade the sale or possession of whiskey, and Mississippi's present regulatory statutes are merely different forms of this prohibitory enactment and still apply on all federal enclaves as to purchases by the type of organizations involved here, which operate with non-appropriated funds.

In reasoning our decision, we shall assume, without deciding, that the legislative powers vested in Congress by article I, § 8, clauses 14 & 17 and article IV, § 3, clause 2 have been exercised, through delegation to the Department of Defense, in language broad enough to preempt all state control of liquor sales prices. This assumption focuses our attention on whether the XXI Amendment forbids the exercise of this congressional power in such a manner as to authorize the sales involved in the case at bar to be consummated contrary to state law.

The procedure we are required to follow has been defined by the Supreme Court. Our analysis must give full play to each of the constitutional provisos "in the light of the other and in the context of the issues and interests at stake". *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964).

The pertinent parts of article I, § 8 of The Constitution provide that the Congress shall have power to make rules for the government and regulation of the land and naval forces and to exercise exclusive legislative authority over all territories purchased with the consent of a state for an armed forces base. Section 2 of the XXI Amendment is posed in these sparse and exact words: "The transportation or importation into any state . . . of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." It is undisputed that the law of the State of Mississippi authorizes the wholesale mark-up exactions on the liquor sales involved. We are therefore required to determine if the XXI Amendment applies, i.e. did the purchases to which the mark-up was added involve transportation of liquor into Mississippi for delivery or use therein?

We will first consider the status of such transactions by the clubs and exchanges located on Keesler Field and on the Naval CB Base. These two military establishments are enclaves over which exclusive jurisdiction has been ceded by Mississippi and accepted by the United States. These lands are to Mississippi as the territory of one of her sister states or a foreign land. They constitute federal islands which no longer constitute any part of Mississippi nor function under its control. The importation of property onto these bases for use thereon would clearly be outside the

ambit of the XXI Amendment. *Collins v. Yosemite Park Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938); *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 (1944). For example, in the Yosemite Park case the Supreme Court opined that while the XXI Amendment had increased the state's power to deal with intoxicating liquors, it did not increase the state's jurisdiction. The court stated:

> As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.

In the case before us now however, the transportation of liquor to these bases was not solely for delivery and use on the military installations. The undisputed facts show that it was acquired for the purpose of being sold to individuals for their use and consumption either on the base or in the surrounding state. *Cf. Johnson v. Yellow Cab Co., supra* at 386. The mere fact that the sales transactions took place on the military installation does not serve to insulate the club's right to purchase from the prohibition of the XXI Amendment. That Amendment replaced unworkable nationwide prohibition under the XVIII Amendment with a form of local option prohibition or control. The effect of allowing a club to import liquor into a federal enclave and sell it there for use in the surrounding state would be identical to the effect of allowing a club to establish a package liquor store in a civilian shopping center near the military station. Both such liquor sales schemes would be subject to state law.

A fortiori, the liquor sales made on the two bases over which the federal and state governments exercise concurrent jurisdiction—Meridian and Columbus—are similarly subject to Mississippi law. Lands which are ceded and accepted with concurrent jurisdiction reserved to the state do not become federal enclaves within the state. Contrary to the situation that exists where exclusive federal jurisdiction cessions are made, such concurrently governed lands remain a part of state territory, subject only to the unblemished authority vested in the federal government to carry out the exclusively federal functions for which the areas were acquired. This reasoning finds firm support in the simultaneously decided milk regulation cases of *Pacific Coast Dairy v. Dept. of Agriculture of California,* 318 U.S. 285, 63 S. Ct. 628, 87 L. Ed. 761 (1943), and *Penn Dairies v. Milk Control Commission of Pennsylvania,* 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943). In *Penn Dairies* the Court held a state milk control commission could fix milk prices for contracts made within an Army encampment that was under the state's concurrent jurisdiction, even though the milk purchased was for military use. The *Pacific Coast Dairy* decision reached just the opposite result—no right of state price control—because the contracts there were made and the milk sales transactions occurred on an enclave exclusively regulated by the federal government. Except for the concurrent and exclusive jurisdictional features of the bases involved, the facts in these cases were identical. Thus, as to the concurrent jurisdiction bases, the liquor sales transactions occurred within the jurisdiction of the State of Mississippi, even where the consumption or other use of the liquor was consummated within the territorial confines of the base.

We do not attempt to say that Congress holds less than exclusive legislative authority over a military base ceded and accepted on a concurrent jurisdictional grant. Article I, § 8, clause 17, as interpreted by *Paul* v. *United States,* 371 U.S. 245, 263, 83 S.Ct. 426, 9 L.Ed. 2d 292 (1943), *Penn Dairies* v. *Milk Control Commission, supra* and *Pacific Coast Dairy* v. *Dept. of Agriculture, supra,* make that right clear. No assertion of power by a state can detract from the federal government's single undivided constitutional power over such a composite federal-state area, except in the instance of the state's constitutional prerogative to enact binding legislation concerning liquor delivered to and used on such a base. This exception obtains, not by dint of state power alone, but rather because the Constitution itself has been amended to make it so. It is the power which flows through the XXI Amendment to operate on the facts in the case at bar that serves to distinguish this case from the milk regulations involved in *Paul* and *Pacific Coast Dairy.*

It is now well-established that while the XXI Amendment does not abrogate the commerce clause, it does limit the ambit of the power of the United States thereunder to the extent of forbidding it to use the commerce clause as a justification for importing intoxicating liquor into a state for delivery and use therein in violation of the laws of the state. *State Board of Equalization* v. *Young's Market Co.,* 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); *Ziffrin, Inc.* v. *Reeves,* 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939); *Carter* v. *Commonwealth of Virginia,* 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605 (1944). While we recognize that the Amendment operates only as a prohibition on power to violate state legislation which regulates intrastate use and distribution and does not

serve to extend the laws of the state to reach conduct beyond its borders, *United States* v. *Frankfort Distilleries,* 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945), the case here involves an assertion of federal power which, in and of itself, violates the Amendment. This cannot be permitted for it would render impossible any harmonious interpretation of the constitutional document as a whole. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* and *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed. 2d 366 (1966). *Cf. Barnett* v. *Bowles,* 151 F.2d 77 (Emergency Ct. App. 1945); *Dowling Bros. Distilling Co.* v. *United States,* 153 F.2d 353 (6th Cir. 1946). In *Barnett* the court approved the imposition of pricing controls on unlawful liquor sales within the State of Mississippi at a time when the laws of the state totally prohibited commerce in such a commodity. The court, however, was careful to point out "The Emergency Price Control Act does not authorize or purport to authorize the sale or transportation or importation for delivery or use of intoxicating liquors into any state in violation of state laws. We find here no conflict in the operation of state and national regulation of intoxicating liquors."

Our decision that the XXI Amendment makes Mississippi law applicable to these transactions makes it unnecessary for us to decide such matters as whether the ambit of the enabling statute will support the Department of Defense regulation, the meaning of the 1966 amendment to those regulations, whether the method of payment followed by the clubs and exchanges here amounted to unrecoverable voluntary payments, the effect of Mississippi's enactment of its ABC law on the prior cessions to the federal government, the effect of the non-appropriated fund status

of these organizations, or whether an assignment of right by individual purchasers or club members to the United States would be a prerequisite to the maintenance of this action. Since our opinion is placed on a basis relating solely to territorial jurisdiction it is also unnecessary to analyse the respective federal and State interests at stake in operating clubs and post exchanges vis-a-vis highway safety and other civilian community problems.

The defendants are entitled to summary judgment on all issues.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF
v.
STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL, DEFENDANTS

Filed March 24, 1972, Southern District of Mississippi.

ROBERT C. THOMAS, *Clerk.*

SPECIAL CONCURRING OPINION

I share the views so well expressed by Judge Clark in the opinion in chief in the captioned case, but feel impelled to inject my thoughts on some principles additionally involved and of controlling effect in this case. A voluntary payment may not be recovered in any suit at law as a universal principle of American jurisprudence. A mere protest is not sufficient to change that principle. Where the payer is not in custody, or his property is not seized, or potentially capable of being seized by a payee, and no principle of coercion or duress exists, a payment is voluntary and cannot be recovered even though the payer protests the payment, and even though the payer knows the facts and actually believes that he owes the payee nothing.

VOLUNTARY PAYMENT

A voluntary payment by a person not then a debtor may not be recovered back. There is no evidence in this record before the Court to show aught but that these payments of these overriding percentages on liquor and wine were made by these clubs to get these alcoholic beverages without sales tax as authorized by 4 U.S.C.A. § 105 and at a specially reduced rate on wine. This is not a claim for a refund of a payment made under any kind of fraud or duress of person or property, but such payment in each instance was made initially to secure the sale and delivery of these alcoholic beverages from the manufacturer upon such payment to it of the markup price in another state.

As to such a payment, *Richfield Oil Corporation v. United States,* (9CA) 248 F.2d 217, 223 says: "The mere fact that payment was made under express protest, is not sufficient to prevent the payment from being a voluntary one which cannot be recovered back. As stated in Pure Oil Co. v. Tucker, 8 Cir., 164 F.2d 945, 947: 'It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance. This is true even though the payor makes the payment * * * under protest * * *.'"

Likewise, in *United States v. Eastport Steamship Corporation,* (2CA) 255 F.2d 795 it is said that in the absence of fraud or duress or mistake of fact, or a reservation agreement, that a party cannot pay a claim and later sue to recover the amount paid, but that the doctrine is applicable only when the recovery is sought

of a sum previously paid. See *Cooperative Refinery Association v. Consumers Public Power District,* 190 F. 2d 852; *Strimling v. Stone,* 193 F.2d 990; *Bowles v. J.J. Schmitt & Co.,* 170 F.2d 617.

In Mississippi a party cannot recover money voluntarily paid with a full knowledge of all of the facts, although no obligation to make such payment existed. *Oscar Hope v. S. W. Evans,* Smedes & Marshall Chancery (1843) 195.

As a general rule, a voluntary payment with full knowledge of the facts cannot be recovered. *Town of Wesson v. Collins,* 18 So. 360; *McLean v. Love,* 157 So. 361. That rule applies as well in equity as to law. *O. C. Tiffany & Co. v. Johnson & Robinson,* 27 Miss. 227. Payment is voluntary where there is no duress or necessity of making payment to free person or property from legal restraint. *Schmittler v. Sunflower County,* 125 So. 534, Suggestion of Error overruled 126 So. 39. The Court in *Schmittler* said: "A payment is voluntary in the sense that no action lies to recover back the amount, not only where it is made willingly and without objection; but in all cases where there is no compulsion or duress nor any necessity of making the payment as a means of freeing the person or property from legal restraint or a grasp of legal process."

In *Security Nat. Bank of Watertown, S.D. v. Young, County Treasurer, et al,* (8CA) 55 F.2d 616, 619, certiorari denied 52 S.Ct. 502 provides: "True, it is alleged that the taxes were paid under protest, but this is not sufficient to save the payment from being voluntary in the sense which bars a recovery of the taxes paid, if it was not made under any duress, compulsion, or threats, or under the pressure of process immediately available for the forcible collection of the tax. Railroad Co. v. Dodge County Commissioners, 98 U.S. 541, 25 L. Ed. 196; Gaar, Scott & Co.

v. Shannon, 223 U.S. 468, 32 S.Ct. 236, 56 L. Ed. 510; United States v. New York & Cuba Mail S.S. Co., 200 U. S. 488, 26 S.Ct. 327, 50 L. Ed. 569; Chesebrough v. United States, 192 U. S. 253, 24 S. Ct. 262, 48 L. Ed. 432."

In *Dennehy v. McNulta,* (7CCA) 86 Fed. 825, the Court said the goods were legitimate subjects of trade and there was no illegality in the nature or the character of purchase. On the contrary, his purchase, so far as appears, was in exact compliance with both his expectations and his bargain. The Court said: "There can be no recovery of money so paid, for the reason that no actual duress is shown, and no element exists to make the payment involuntary or compulsory." *Radich v. Hutchins,* 95 U.S. 210, 213; *Lonergan v. Buford,* 13 S.Ct. 684. In *Radich,* the Court said: " 'To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' Mayor, etc., v. Lefferman, 4 Gill, 425; Brumagim v. Tillinghast, 18 Cal. 265; Mays v. Cincinnati, 1 Ohio St. 268.' In the case at bar neither the persons nor the property of the purchaser were within the physical control of the sellers when the contract of purchase were entered into, or when the payments were

made thereupon, and in the eye of the law the transactions were voluntary."

In *Putnam Tool Company* v. *United States,* 147 F. Sup. 746, United States Court of Claims, certiorari denied 78 S. Ct. 33 provides: "We think that the plaintiff's payment to the government was a voluntary payment, in the legal sense, and that it cannot recover a part of it in this suit. * * * One cannot, in the absence of fraud or duress or mistake of fact or reservation agreement, or, perhaps, other special circumstances, pay a claim and later sue to recover the amount paid. The plaintiff alleges, as we have said, that there was compulsion upon it which caused it to pay the claim." The compulsion involved was interest on a large indebtedness. The court said that "the fact that interest will or may accrue upon a claim, if it is not paid, is not legal duress which will make its payment recoverable."

In *United States* v. *Eastport Steamship Corporation,* (2CA) 255 F.2d 795 provides: "Under the doctrine of voluntary payment 'One cannot, in the absence of fraud or duress or mistake of fact or reservation agreement, or, perhaps, other special circumstances, pay a claim and later sue to recover the amount paid.' The doctrine is applicable only when recovery is sought of a sum previously paid. *McKnight* v. *United States,* 1878, 98 U.S. 179 25. L.Ed. 115, affords an excellent illustration. In that case the Government had paid a sum of money to the assignees of a contractor to whom the Government was indebted. Subsequently, replying upon the undisputed invalidity of the assignment, the Government sought to recover the amount paid. Recovery was denied on the ground of voluntary payment."

In *Little* v. *Bowers, Comptroller,* 10 S.Ct. 620, 621: "In *Wabaunsee Co.* v. *Walker,* 8 Kan. 431, cited with

approval in *Lamborn* v. *Commissioners,* 97 U.S. 181, and also in *Railroad Co.* v. *Commissioners,* 98 U.S. 541, 543, it was said: 'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment files a written protest, does not make the payment involuntary.' "

In *United States* v. *William Edmondston,* 21 S.Ct. 718, 722 provides: " 'This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Department; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the government, without claim of any right to retain one penny of it.' It is clear from these references that this court has distinctly and constantly recognized the doctrine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered, and also that that doctrine applies to cases in which one of the parties is the government, and that money thus voluntarily paid to the government cannot be recovered."

In *United States v. New York & Cuba Mail Steamship Co.,* 26 S.Ct. 327, 329: "And, expressing the principle to be applied, the court said, in the Chesebrough Case, 24 S.Ct. 262, 'even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any

coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.'" * * * "It is stated in Union P.R. Co. v. Dodge County, 98 U.S. 541, 25 L. ed. 196, and quoted from that case in Little v. Bowers, 134 U.S. at page 554, 33 L. ed. at page 1019, and 10 Sup. Ct. Rep. at page 621, as follows: 'Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back.'"

THE UNITED STATES IS NOT A PREFERRED LITIGANT

The funds sought to be recovered belong to the members of service clubs on United States bases in Mississippi. None of it was derived, or made possible by any appropriation of public money. The United States by statute has the right to sue therefor just as would the club itself, but it has no preferential advantage as a litigant over the real party in interest. The Supreme Court of the United States many years ago said that the United States as a litigant appears in its own court with the same rights and the same responsibilities as the humblest litigant.

In *Lacy* v. *United States,* (5CA) 216 F.2d 223, 225 says: "The Government when applying for relief in a court of equity is as much bound to do equity as is a private litigant. United States v. Belt, D.C., 47 F. Supp. 239, vacated 319 U.S. 521, 63 S.Ct. 1278, 87

L.Ed. 1559, affirmed 79 U.S.App.D.C. 87, 142 F.2d 761; United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 338, 26 S.Ct. 282, 50 L.Ed. 499; Daniell v. Sherrill, Fla., 48 So.2d 736, 737, 23 L.R.A.2d 1410. 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.' Luckenbach S.S. Co. Inc. v. The Thekla, 266 U.S. 328, 339, 340, 45 S.Ct. 112, 113, 69 L.Ed. 313."

In *United States* v. *Maryland Casualty Company*, (5CA) 235 F.2d 50, 53 says: "Beseeching the Court on equitable terms for leave to intervene, the Government is and ought to be treated as would be any other suitor, for '* * * when government invokes the aid of the court as a litigant it stands as any other litigant * * *', Jones v. Watts, 5 Cir., 142 F.2d 575, 577, 163 A.L.R. 240, certiorari denied 323 U.S. 787, 65 S.Ct. 310, 89 L.Ed. 628; In re Minot Auto Co., 8 Cir., 298 F. 853, 857."

In *Guaranty Trust Co. of New York v. United States,* 58 S.Ct. 785 says: "Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. Luckenbach S.S. Co. Inc. v. The Thekla, 266 U.S. 328, 340, 341, 45 S.Ct. 112, 113, 69 L.Ed. 313; United States v. Stinson, 197 U.S. 200, 205, 25 S.Ct. 426, 49 L.Ed. 724; The Davis, 10 Wall. 15, 19 L.Ed. 875; The Siren, 7 Wall. 152, 159, 19 L.Ed. 129. As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts."

91 C.J.S. 420 teaches: "The rights of the United States are ordinarily measured by the same rules as those of a private litigant."

This Is Not a Suit For a Debt Owing to the United States

This is a suit which the United States has a right to bring as a sovereign under the circumstances, but it is not the real party in interest in such funds, and if recovered, will not be covered into the general fund of the United States Treasury. Not one dime of this money ever come from public revenue.

Although the United States has the right to sue the employer under the wage and hour law to recover back wages due according to the act, it cannot be said that the debt is one due the United States within the meaning of 31 U.S.C.A. § 191 and, therefore, entitled to priority under the bankrupt act. *Nathanson* v. *National Labor Relations Board,* 73 S.Ct. 80, 82 the Court said: "It does not follow that because the board is an agency of the United States, any debt owed it is a debt owing the United States within the meaning of R.S. § 3466." The Court further said: "There is no function here of assuring the public revenue. The beneficiaries of the claims are private persons as was the receiver in *American Surety Co. v. Akron Savings Bank,* 212 U.S. 557, 29 S.Ct. 686, 53 L.Ed. 651."

These Clubs Were Acually Subject to the State Sales Tax

But they procured an exemption from the state sale tax on hard liquor and wine and mixed drinks very much to their advantage by this contractual arrangement which allowed them the privilege of buying their alcoholic beverages outside Mississippi with a

specified markup price considered fair by the parties at the time. The fact that these clubs contemplated operation upon government enclaves provided no exemption, and particularly when the government itself had no responsibility therefor.

In *James, as State Tax Commissioner of West Virginia* v. *Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 218: "In Union P. Railroad Co. v. Peniston, 18 Wall. 5, 33, 36, 21 L.Ed. 787, the Court said: 'It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States.'"

THE TRANSACTIONS IN SUIT OCCURRED AND THE FUNDS ACCRUED NOT ON ANY ENCLAVE IN MISSISSIPPI, BUT OUTSIDE MISSISSIPPI IN EACH INSTANCE

There is no statute or decision which exempts these bases from these arrangements whereby they purchased these alcoholic beverages in other states from these wholesalers at an agreed markup price to the wholesalers. It was the wholesaler and not the clubs that paid these markup prices to the State Tax Commission in exchange for the right to sell these products in other states for resale in Mississippi.

In *Pacific Coast Dairy, Inc. v. Department of Agriculture of California, et al*, 63 S.Ct. 628, the dairy sold milk to the Quartermaster's Department at Moffett Feld at less than the minimum price fixed for the area. Congress refused to authorize the Armed Services to refuse bids for milk below the California Milk Stabiliza-

tion Law price. Moffett Field operated under the exclusive jurisdiction of the government. The exclusive character of jurisdiction at Moffett Field is conceded. The Court said that contracts to sell and sales consummated within the enclave cannot be regulated by California law. The Court observed that on this day in *Penn Dairies v. Milk Control Commission,* 63 S.Ct. 617, that a different decision is required where the contract and sales occur within a state's jurisdiction, absent specific national legislation excluding the operation of the state's regulatory laws. The Congress has the power to protect its exclusive jurisdiction on the enclave but not elsewhere unless expressly so provided.

Accordingly, for the reasons stated in the opinion in chief and for the additional reasons stated herein, the complaint in this case is without merit and should be dismissed with prejudice without any assessment of costs.

HAROLD COX,
U.S. District Judge.

March 20, 1972.

APPENDIX B

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., DEFENDANTS

Filed March 30, 1972, Southern District of Mississippi.

ROBERT C. THOMAS, *Clerk.*

JUDGMENT

For the reasons stated in the opinions of the Court, incorporated herein and made a part hereof by reference thereto, the complaint in the captioned case is without merit and is hereby dismissed with prejudice without any assessment of costs.

Ordered, adjudged and decreed, this March 27th, A.D., 1972.

CHARLES CLARK,
U.S. Circuit Judge.
DAN M. RUSSELL, JR.,
U.S. District Judge.
HAROLD COX,
U.S. District Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, CHAIRMAN; JIMMIE WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI; AND THE STATE OF MISSISSIPPI, DEFENDANTS

Filed May 1, 1972, Southern District of Mississippi.
ROBERT C. THOMAS, *Clerk*.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on January 30, 1972.

This is an appeal from a final judgment in a civil action required by Section 2281, Title 28, United States Code, to be heard by a district court of three

judges and this appeal is being taken under the provisions of Section 1253, Title 28, United States Code.

ROBERT E. HAUBERG,
U.S. Attorney.
By JOSEPH E. BROWN, Jr.,
Assistant U.S. Attorney.

Attorney for the United States of America, Post Office Box 2091, Jackson, Mississippi 39205.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

(Civil Action No. 4554)

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ARNY RHODEN, CHAIRMAN; JIMMY WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI, AND THE STATE OF MISSISSIPPI, DEFENDANTS

STIPULATION OF FACTS BETWEEN PLAINTIFF UNITED STATES OF AMERICA AND DEFENDANTS STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

The plaintiff United States of America and defendants State Tax Commission of the State of Mississippi, et al., herein stipulate that the following facts are true and correct, without prejudice to the right of any party to object to any of said facts as incompetent, immaterial or irrelevant evidence in this case:

1. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

2. The four bases were purchased by the United States with the consent of the State of Mississippi.

3. The lands comprising Keesler Air Force Base at Biloxi and the United States Naval Construction Battalion Center at Gulfport, Mississippi were acquired in the following manner:

(a) *Keesler Air Force Base.* The main base, which comprises 1,061.92 acres, was acquired as follows: 717.20 acres by letter to Governor Fielding L. Wright from Harold C. Stuart, Assistant Secretary of the Air Force, dated April 19, 1950, and acknowledged April 24, 1950 (Exhibit 1); 344.72 acres by general blank letters of acceptance as follows: (1) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War dated January 9, 1945, and acknowledged January 15, 1945 (Exhibit 2); (2) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War, dated May 12, 1944, and acknowledged May 15, 1944 (Exhibit 3); (3) letter to Governor Paul B. Johnson from Henry L. Stimson, Secretary of War, dated May 26, 1943 and acknowledged June 1, 1943 (Exhibit 4).

(b) *U.S. Naval Construction Battalion Center.* The lands were acquired by Declaration of Taking filed by the Secretary of the Navy in the District Court of the United States for the Southern Division of the Southern District of Mississippi, as follows: (1) *United States of America* v. *911.50 acres, more or less, in Harrison County, Mississippi, G. B. Dantzler, et al.,* Civil No. 216, filed on April 30, 1942. Jurisdiction over this property was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942, and acknowledged December 29, 1942 (Exhibit 5); (2) *United States of America* v. *2.4 acres of land, more or less, in Harrison County,*

Mississippi, Mrs. Anna J. Ott, et al., Civil No. 224, filed on November 6, 1942. Jurisdiction over this land was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942 and acknowledged December 29, 1942 (Exhibit 6). (3) *The United States of America* v. *223 acres of land in Harrison County, Mississippi, Mrs. Gladys Finston, et al.,* Civil No. 285, filed on May 5, 1943. Jurisdiction was accepted by letter to Governor Dennis Murphree from Ralph A. Bard, Assistant Secretary of the Navy, dated January 6, 1944 and acknowledged January 9, 1944 (Exhibit 7).

4. Mississippi ceded to the United States and United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station.

5. The Officers' Open Mess, Noncommissioner Officers' Open Mess, and the Airmen's Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—closed, Chief Petty Officers' Mess—open, Navy Exchange Enlisted Men's Club of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—open, the Commissioned Officers' Mess—closed, the Commissioned Officers' Mess—open, the Navy Exchange Enlisted Men's Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are all nonappropriated fund instrumentalities established in accordance with the pertinent regulations of the Air Force and the Navy.

6. Section 6 of the 1951 Amendments to the Universal Military Training and Service Act (50 U.S.C. App. 473) reads as follows:

> The Secretary of Defense is authorized to make such regulations as he may deem to be

appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

7. On May 4, 1964, the Secretary of Defense issued Department of Defense Directive 1330.15, which reads as follows:

Subject: Alcoholic Beverage Control.

References:

(a) Section 6, 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473.

(b) DoD Directive 1330.1, "Regulations for the Control of Alcoholic Beverages," December 17, 1953 (hereby cancelled).

(c) DoD Instruction 4175.2, "Purchase of Distilled Spirits for Resale by Military Installations which are Located in Monopoly States," April 19, 1956 (hereby cancelled).

I. AUTHORITY AND PURPOSE

Under the authority contained in reference (a) this Directive assigns responsibility and establishes uniform Department of Defense policy governing the sale of alcoholic beverages.

II. APPLICABILITY AND SCOPE

The provisions of this Directive apply to all DoD components and to all persons eligible to patronize on-base outlets selling alcoholic beverages in the United States and the District of Columbia.

III. RESPONSIBILITY

A. OFFICE OF THE SECRETARY OF DEFENSE

The Assistant Secretary of Defense (Manpower) (ASD(M)) shall be responsible for the administration of this Directive throughout the DoD.

B. MILITARY DEPARTMENTS

The Secretaries of the Military Departments shall be responsible for effectively carrying out the policies of this Directive and to make and issue implementing regulations in accordance with existing applicable laws.

IV. GENERAL POLICY STATEMENTS

A. USE OF ALCOHOLIC BEVERAGES

The established policy of the Department of Defense with respect to controlling the use of alcoholic beverages by members of the Armed Forces is to encourage abstinence, enforce moderation, and punish over-indulgence. This policy can be carried out most effectively through command supervision.

B. RESTRICTIVE CONTROLS AND AFFIRMATIVE MEASURES

1. Restrictive controls shall be established by Secretaries of the Military Departments which recognize (as the primary consideration) the varying conditions and requirements of military service, yet do not discriminate against individuals in the Armed Forces by

denying them the rights and privileges of other citizens.

2. Affirmative measures shall be taken, including but not limited to providing (a) character guidance, with emphasis on the harmful effects of the immoderate use of alcoholic beverages, using the advice and assistance of chaplains, and (b) wholesome recreation, entertainment, and relaxation for individuals in the Armed Forces both on and off station, using the initiative and assistance of local communities and national organizations.

C. COOPERATION

1. DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, without regard to prices locally established by state statute or otherwise.

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

V. AUTHORIZED SALES

A. OTHER THAN PACKAGED ALCOHOLIC BEVERAGES

Appropriate regulations controlling the sale of alcoholic beverages dispensed by the drink, or beer sold in other than sales outlets for pack-

aged alcoholic beverages, may be promulgated by the Secretaries of the Military Departments.

B. SALES OUTLETS FOR PACKAGED ALCOHOLIC BEVERAGES

The sale of packaged alcoholic beverages, other than beer, may be authorized on military installations when the Secretary of a Military Department approves the establishment of such sales outlets after determining that the authorization will be beneficial to the morale of the military community.

1. In arriving at such determinations, the Secretary of a Military Department will take cognizance of all pertinent factors including the following criteria as applicable:

(a) Estimated number of authorized patrons per outlet if granted.

(b) Importance of estimated contributions of package store profits to providing, maintaining and operating clubs, messes and other recreational activities.

(c) Availability of wholesome family social clubs to military personnel in the local civilian community.

(d) Geographical inconveniences.

(e) Limitations of non-military sources.

(f) Disciplinary and control problems due to restrictions imposed by local law and regulation.

(g) Highway safety.

(h) A digest of the attitudes of community authorities or civic organizations toward establishment of a package sales outlet.

2. An information copy will be dispatched to the ASD (M) of each action approving the establishment of sales outlets for packaged alcoholic beverages, including the determinations and findings made in accordance with the criteria as stated above.

3. Controls

(a) Purchase and consumption

Although individual rationing will not be required, installation commanders will maintain a continuing review of the amount of alcoholic beverages purchased in the sales outlets and the number of authorized purchasers. If such review indicates that the purchases equated to the number of authorized individuals results in an excessive per capita amount, appropriate control measures will be instituted to assure compliance with Section IV.A or V.B.3.c. as applicable.

(b) Pricing

Prices in authorized sales outlets for packaged alcoholic beverages shall be within ten per cent (10%) of the lowest prevailing rates of civilian outlets in the area. Exceptions will be granted only upon approval by the Secretary of the cognizant Military Department upon a substantiated showing, to be made in each case, that special factors warrant an exception thereto.

(c) Diversion

Diversion, to unauthorized persons of packaged alcoholic beverages purchased by members of the Armed Forces in authorized sales outlets, is a serious offense and where substantiated will be punished.

4. Eligibility for patronage of sales outlets

Eligibility for patronage of sales outlets for alcoholic beverages on military installations will be restricted to authorized personnel prescribed by the Secretaries of the Military Departments.

VI. IMPLEMENTATION

Within thirty (30) days from the date of this Directive, the Secretaries of the Military Departments shall submit to the ASD (M) for approval their proposed implementing regulations.

VII. CANCELLATIONS

References (b) and (c) are cancelled.

8. On June 9, 1966, the following change 1 to Directive 1330.15 was issued:

The following pen change to DoD Directive 1330.15, 'Alcoholic Beverage Control,' May 4, 1964, has been authorized, *effective immediately*:

PEN CHANGE to *Page 2, Section IV.C.1:* Delete the last clause reading as follows: 'without regard to prices locally established by state statute or otherwise.'

9. The following memoranda and letter are certified true copies from the official files of the Department of Defense relating to said Directive of June 9, 1966:

(a) Memorandum For Secretaries of the Military Departments from Thomas D. Morris, Assistant Secretary of Defense (Manpower), dated April 15, 1966 (Exhibit 8);

(b) Memorandum For: Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966 (Exhibit 9);

(c) Memorandum For: Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966 (Exhibit 10);

(d) Memorandum For The Assistant Secretary of Defense(Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966 (Exhibit 11);

(e) Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966 (Exhibit 12);

(f) Memorandum for The Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966 (Exhibit 13);

(g) Memorandum For The Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966 (Exhibit 14);

(h) Letter to Mr. Charles B. Buscher, Executive Director, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966 (Exhibit 15).

10. Mississippi's Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265–01 *et seq.*, enacted July 1, 1966, a true copy of which is attached hereto as Exhibit 16, imposes regulatory control of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

11. The Alcoholic Beverage Control Division promulgated Regulation No. 22, entitled "Sales to Military Post Exchanges, etc., Effective September 1, 1966", which reads as follows:

REGULATION No. 22

SALES TO MILITARY POSTS EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and oper-

ated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%. This was reissued, without substantial change in content, as Regulation No. 30, dated September 14, 1970.

12. The nonappropriated fund instrumentalities enumerated in Paragraph 6, hereof, elected to purchase all of their alcoholic beverages directly from distillers or suppliers. Under protest, but pursuant to Regulation No. 22 (now Regulation No. 30), they paid the aforementioned markups to the distillers and/or suppliers, and said distillers and/or suppliers collected the markups and remitted them directly to the Mississippi Alcoholic Beverage Control Division.

13. The Alcoholic Beverage Control Division maintains a wholesale warehouse for the distribution of alcoholic beverages as a service to purchasers. The wholesale services and facilities are available both to the military and other purchasers. The Division is required by law to maintain these facilities whether they are utilized or not. In instances where the nonappropriated fund instrumentalities listed in Para-

graph 6, hereof, make purchases of alcoholic beverages direct from distillers located outside the State of Mississippi with shipment being made direct to said organizations, the Division does not transport, store, distribute or perform any other direct service connected with the purchases.

14. By letter dated May 23, 1967 addressed to "All Firms Selling Alcoholic Beverages to the State of Mississippi," the Mississippi Alcoholic Beverage Control Division informed such firms as follows:

> Subject: Sales to Military Post Exchanges, Ship Stores and Officers Clubs.
>
> You are hereby advised that the following Regulation issued under authority granted by HB 112, laws of 1966, *has not been suspended or amended,* therefore, all provisions remain in force and shall be strictly adhered to:
>
> REGULATION No. 22
>
> SALES TO MILITARY POST EXCHANGES,ETC.
>
> EFFECTIVE SEPTEMBER 1, 1966
>
> Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.
>
> All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the

Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%."

Any supplier who fails or refuses to strictly observe the above Regulation shall be considered as having violated the Alcoholic Beverage Control laws of Mississippi and promptly deprived of the benefits of same; and in addition thereto may be prosecuted for violating the act and subject to the penalties set forth therein.

Submitted by:

/s/ A. V. BEACHAM, M.D.,
A. V. BEACHAM, M.D., *Director.*

cc: Commanders of Military Posts located in Mississippi

(Underscoring so in original).

15. By letter dated June 8, 1967, addressed to "Alcoholic Beverage Suppliers", on the subject of "Compliance With Alcoholic Beverage Control Regulation No. 22—Sales To Military Officers Clubs, Post Exchanges, Ships Stores, Etc.," the Mississippi Alcoholic Beverage Control Division informed such suppliers as follows:

Gentlemen: The mark-up regulatory fee required by the subject regulation must be remitted directly to this Division on the date shipments are made to the Military base. Said fee must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base. Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without immediately remitting the fee directly to the Alcoholic Beverage Control Division of the State Tax Commission and collecting said fee directly from the said Military organization shall be in violation of the Alcoholic Beverage

Control laws and regulations issued pursuant thereto. Payments by the Military organizations into an escrow account in lieu of payment to the suppliers have not been approved by the State of Mississippi and any such payments permitted by the suppliers shall subject such suppliers to penalties as provided by law and regulations. In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division *will be delisted.*

If this letter is not completely and perfectly clear we strongly suggest that you contact this office prior to accepting further orders.

Yours very truly,
/S/ A. V. BEACHAM, M.D.,
A. V. Beacham, M.D., Director,
Alcoholic Beverage Control Division,
State Tax Commission.

AVB:am
(Underscoring so in original).

16. The Alcoholic Beverage Control Division initially sought to require the said nonappropriated fund instrumentalities to obtain an alcoholic beverage permit from the Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi. After their refusal to obtain such permit, the Division made no further effort to enforce this requirement.

17. The amount of the markups paid by the affected nonappropriated fund instrumentalities to suppliers outside the State of Mississippi and remitted by them to the Mississippi Alcoholic Beverage Control Division has totalled $648,421.92 from September 1966 through July 31, 1971.

18. The following Directives, Regulations and Manuals govern the operation of the clubs and other non-

appropriated fund instrumentalities of the Air Force and Navy:

Department of Defense Directive No. 1330.15 dated May 4, 1964, as revised June 9, 1966, and applicable to the nonappropriated fund instrumentalities of all military departments (Exhibit 17);

Air Force Regulation 34–57, dated December 22, 1970, entitled, The Control of Alcoholic Beverages: Their Procurement, Sale and Use, with Change 1, dated March 25, 1971 (Exhibit 18);

Air Force Regulation 176–1, dated July 30, 1968, entitled, Nonappropriated Funds: Basic Responsibilities, Policies, and Practices, with Changes 1, 2, 3, 4, 5, 6, and 7 (Exhibit 19);

Air Force Manual 176–3, dated May 12, 1971, entitled Nonappropriated Funds: Operational Manual for Open Messes and Other Sundry Associations (Exhibit 20);

Navy regulations contained in the Manual for Messes Ashore, 1962, with Changes 1 through 6 (NAVPERS 15951) (Exhibit 21.).

19. The net profits earned by the aforesaid nonappropriated fund instrumentalities listed in Paragraph 6 of this stipulation, from the sale of alcoholic beverages for the calendar year 1969 and fiscal year 1971, and the use made thereof, were as follows:

(1) *Keesler Air Force Base:* Officers' Open Mess: 1969—$51,542.10; 1971—$12,554.78. Used for general maintenance of the club. NCO Open Mess: 1969—$55,348.55; 1971—$20,684.08. Used for general maintenance of the club and purchase of equipment.

(2) *Columbus Air Force Base:* Officers' Club: Fiscal year 1970, with beer sales included, $11,732.62; 1971—$12,654.43. Used for general maintenance of the club. NCO club: 1969—$23,241.23. Used for the general maintenance of the club. 1971—$15,864.87. Put into

special reserve fund for major improvements and decorations.

(3) *U.S. Naval Construction Battalion Center:* Commissioned Officers' Mess—closed: 1971—$1,977; Chief Petty Officers' Mess—open: 1971—$17,048. Put into clubs' reserve funds and used for additions and improvements to the clubs. Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $8,113; Enlisted Mens' Club (Bar sales), $20,027. Profits were held for the club for entertainment, refurbishment and similar purposes for improving the club.

(4) *Naval Air Station, Meridian:* Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $4,370; Enlisted Mens' Club (Bar sales), $12,838. Profits are held for the club for entertainment, refurbishment and similar purposes for improving the clubs; CPO Mess: 1969—$4,755.29; 1971—$6,204. Profits used to help pay wages and other mess administrative expenses; Commissioned Officers' Mess-open: 1969—$14,154.45; 1971—$8,620. Put in club's reserve fund and used for additions and improvements to the club.

21. The following Interrogatories to the Plaintiff and the Plaintiff's Answers thereto:

> "5. What, if any, reason exists why the personnel at the four military bases named in paragraph 6 of the complaint cannot supply their legitimate needs for packaged liquor by purchases from retail stores licensed by the State of Mississippi?
>
> Answer. The nature and characteristics of military service and the circumstances and conditions governing such service cause Armed Forces personnel and their families to form their own community on the military installation and to remain separated from the sur-

rounding civilian community. Members of the Armed Forces are subject to military discipline. Their place of duty assignment and hours of duty are fixed on the basis of the needs of the service and not upon personal preferences of the individual. Because they share the same outlook and the same working and living conditions, Service families look to each other and to the installation to which they are assigned for the satisfaction of their duty and off-duty needs.

The clubs, including their packaged liquor stores, furnish a necessary and important service to Armed Forces personnel and their families. They provide convenient facilities for off-duty dining, entertainment, relaxation and amusement. To the military community, they are the counterparts of similar facilities that are available to civilians in the civilian community.

Because they are conveniently located, are oriented to the special needs and circumstances of Service families, and are a particular earmark of military life, they contribute to the establishment and maintenance of Service morale and esprit de corps."

"6. What if any, reason exists why the alleged Federal instrumentalities named in paragraph 6 of the complaint cannot supply the legitimate needs of the aforesaid personnel without avoiding payment of the wholesale markup on packaged liquor required by the State of Mississippi as to all packaged liquor sold in the State?

Answer: Members of the Armed Forces are stationed at installations and transferred therefrom as the needs of the Service dictate, and not on the basis of personal preferences. Because of these circumstances, it is desirable from a morale standpoint that each installation furnish substantially similar off-duty facilities

for its military community, including clubs, packaged liquor stores, etc. This policy aids in easing the burden and inconvenience of transfers of personnel from one installation to another.

The 17 or 20 per cent wholesale mark up on liquor in Mississippi has a substantial effect on the price at which it can be sold on the installation. No other State has such a requirement. If the wholesale mark up is paid by clubs at installations in Mississippi, their resale prices would be higher than at clubs located on installations in other States throughout the country. It would be one factor which would make service at installations in Mississippi less attractive than in other States and would detrimentally affect the morale of Armed Services personnel transferring to installations in the State of Mississippi."

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Mississippi Local Option Alcoholic Beverage Control Law, Section 10265-18(c) .....

Mississippi State Tax Commission Regulation 25 3,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

Number 72-350

UNITED STATES OF AMERICA,
Appellant,

vs.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al.,
Appellee.

On Appeal from the United States District Court for the Southern District of Mississippi

MOTION TO AFFIRM OR DISMISS

OPINION BELOW

The opinion of the three-judge district court is reported at 340 F. Supp. 903.

JURISDICTION

The opinion of the three-judge district court is attached hereto as Appendix "A." This opinion was rendered on March 20, 1972, and the judgment was entered on March 30, 1972. The United States gave notice of appeal on May 1, 1972, and on June 22, 1972, Mr. Justice Powell ex-

tended the time for docketing the appeal to and including August 29, 1972. The jurisdiction of this court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the State of Mississippi has imposed an impermissible burden on retail alcoholic beverage businesses conducted by federal agencies on federal enclaves within the borders of the state.

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATION INVOLVED

Article I, Section 8 provides in part:

> The Congress shall have Power * * *
>
> To raise and support Armies, * * *
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *

Article IV, section 3 provides in part:

> To exercise exclusive Legislation in all Cases and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for de-

livery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 10265-18(c) of the Mississippi Local Option Alcoholic Beverage Control Law provides:

> The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic beverages, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at whoesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act.

Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

STATEMENT

The Appellee agrees that the material facts are not in dispute since the case was submitted on a stipulation of facts, said stipulation appearing as Appendix "D" of the brief of the Appellant. Mississippi prohibited the sale or possession of alcoholic beverages until 1966. In that year, it adopted a local option policy subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages. Mississippi Code, annotated, Sections 10265-01, et seq. The Commission was authorized to sell to retailers in the State "including, at the discretion of the Commission, any retail distributors operating within any military post * * * within the boundaries of the State * * * exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with provisions and purposes of the Act."

Pursuant to this statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. The Regulation requires, on direct orders from such military facilities, that distillers collect and remit from the Commission the Commission's "usual wholesale mark-up." During the period in issue, the wholesale mark-up was seventeen per cent (17%) on distilled spirits and twenty per cent (20%) on wine.

The officers' and non-commissioned officers' clubs and other non-appropriated fund activities on four military bases in Mississippi had purchased liquor from distillers and suppliers when Mississippi was a "dry" State, and they decided to continue this practice rather than purchase from the Commission. Two of the bases, Keesler Air Force Base and the Naval Construction Batallion Center, are enclaves of federal jurisdiction over which Mississippi retained only the right to serve civil and criminal process. On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the state exercise concurrent jurisdiction.

Soon after the Mississippi Regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the "mark-up" was improper. The military authorities also attempted to pay the amounts for the "mark-up" into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the "mark-up" on their military sales to the Commission, the distillers would be subject to criminal prosecution and to de-listing, i.e., loss of the privilege of selling to the Commission for retailing in Mississippi. To obtain liquor, therefore, the military facilities were required by the distillers to pay the "mark-up". By July 31, 1971, Six Hundred Forty-Eight Thousand, Four Hundred Twenty-One Dollars and Ninety-Two Cents had been paid under protest to suppliers outside Mississippi for such "mark-ups".

The United States instituted this action on November 3, 1969, seeking a declaration that the Regulation is unconstitutional and an injunction against its continued enforcement, and seeking to recover the amount already paid for "mark-ups".

The District Court granted summary judgment against the government. It held that the constitutional grants to Congress regarding military forces and property belonging to the United States "are diminished by the express provision of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction". With respect to liquor sold by the drink on the four bases, the court made no express holding, but its judgment denied all relief to the government. Judge Cox joined the court's opinion and added in a concurrent opinion that a refund under the "mark-up" was also barred because those payments had been voluntarily made.

ARGUMENT

The Appellee relies on four holdings of this court for its grounds for an affirmance of the judgment of the District Court. These four holdings are: (1) **Ohio v. Helvering**, 292 U. S. 360, 78 L. Ed. 1307, 54 S. Ct. 725 (1934), that economic burdens imposed on a sovereign's conduct of alcoholic beverage business for a profit did not interfere with sovereign functions; (2) **Collins v. Yosemite Park Company**, 304 U.S. 518, 82 L. Ed. 1502, 58 S. Ct. 1009 (1938), where the State excise tax on alcoholic beverages may constitutionally be applied to purchases made for resale by a federal instrumentality on a federal enclave; (3) **Paul v. United States**, 371 U.S. 245, 9 L. Ed. 2nd 292, 83 S. Ct. 426 (1963), that military procurement by non-appropriated fund instrumentalities must comply with state price control regulation, where such regulation was authorized at the time federal jurisdiction over the military enclave in question was acquired; (4) **Seagram and Sons v. Hostetter**, 384 U.S. 35, 16 L. Ed. 2nd 336, 86 S. Ct. 1254 (1966), that the XXI Amendment authorizes state alcoholic beverage wholesale price control that does not otherwise violate the United States Constitution.

No reasons have been advanced by the Solicitor-General for a reconsideration of any of these holdings. The **Ohio** and **Seagram** cases, supra, are not even cited in the brief of the Appellant. The **Collins** and **Paul** cases, supra, are cited without a full disclosure of what the court actually held.

1. The wholesale "mark-ups" in issue did not interfere with the performance of any military function.

The Solicitor-General's statement of Questions Presented wrongly suggest that the "military procurement" allegedly interfered with was for military rations. This procurement was in fact by military social clubs for re-

sales at retail that yielded profits devoted to recreational activities enjoyed by military personnel, their families and their guests. There is no proof that even these activities were in any way hampered by Mississippi's alcoholic beverage laws.

The State of Mississippi collects the challenged wholesale "mark-ups" from all suppliers of wines and spirits because it is by law the exclusive wholesaler for the entire state. The wholesaler functions for which the "mark-up" was collected were performed by the suppliers only in the case of direct sales to these military clubs. The clubs had the option of purchasing from the state instead of from the suppliers, in which case these wholesale functions would have been performed by the state.

The clubs could not, under either option, perform themselves the wholesaler functions for which the "mark-up" was paid. No facts were adduced to show that the suppliers, who set the prices paid by the clubs, would not have kept for themselves the wholesale "mark-up" collected from these clubs if they had not been compelled by Mississippi law to remit these "mark-ups" to the state.

These clubs are seeking a price advantage that no other retailer of alcoholic beverages, in Mississippi or elsewhere, customarily receives, to wit, a wholesaler's price that excludes any compensation for wholesaling services. Moreover, the challenged regulation exempted the club purchases from the gallonage tax on wine and spirits. (These taxes were Two Dollars and a Half on distilled spirits, a Dollar per gallon on sparkling wines and champagnes and Thirty-Five Cents per gallon on other wines.) What prices the clubs would have paid, absent the challenged regulation, is purely speculative but they might well have paid more. The only policy

reason advanced below by the armed services for even lower prices than the clubs received, that of uplifted military morale, has apparently been abandoned by the Solicitor-General, yet no other policy justification has been suggested.

2. Neither the complaint, the federal regulation involved, nor the authorizing federal statute distinguishes between bases where the United States has exclusive jurisdiction and bases where state and federal jurisdiction is concurrent.

A copy of the complaint is attached as Appendix "B". It seeks an injunction against enforcement of Mississippi's law and regulations on all of the bases involved and a money judgment for Three Hundred Nineteen Thousand, Seven Hundred Forty Dollars and Fifty-One Cents ($319,740.51), the total "mark-ups" then collected. The stipulated facts as to the total amount of the disputed mark-ups at the time of the trial, Six Hundred Forty Eight Thousand, Four Hundred and Twenty One Dollars and Ninety-Two Cents ($648,421.92), does not permit the entry of any judgment based only upon sales made to particular bases. The military regulations relied upon applied to "any camp, post, station, base or other place primarily occupied by members of the armed forces within the United States" (See Department of Defense directive 1330.15 and page 32a, Jurisdictional Statement).

The federal statute relied upon to authorize these regulations does not even limit them to military bases. The statute applies to conduct "at or near" military bases and does not require that the regulated activity occur on any base. (See Draft Extension Act of 1951, Section 6, 50 U.S.C.A., App. 473, as quoted in paragraph seven of the complaint and in the opinion below; Jurisdictional Statement, page 5a.)

The Solicitor-General suggested that this case presents a separate question as to "military bases over which the jurisdiction of the United States is 'exclusive'" is not borne out by the record made below. There was no discrete presentation of this question to the District Court and it should not be treated by this court as separable from the basic challenge of Mississippi's authority over sales to military clubs presented by the complaint.

3. As stated in the brief of the Appellee, the only constitutional question presented by the decision below is whether Mississippi has imposed an impermissible burden on retail alcoholic beverage businesses conducted by federal agencies on federal enclaves within the borders of the state.

The court below correctly resolved this question by an analysis of the limits set by the XXI Amendment on federal power over the alcoholic beverage business. The Jurisdictional Statement attacks the correctness of this holding by ignoring what this court did in **Collins v. Yosemite Park**, supra, and holding the application of California's gallonage tax to sales made for resale in the Park. Instead the statement focuses attention on what the court said in refusing to compel a park concessionaire to apply for a California retailer's permit. California's tax was sustained as to all sales made to the concessionaire for resale at the Park because California had reserved taxation rights in its session of federal jurisdiction. But California could not validly reserve a power it could not constitutionally possess. If, as the Solicitor-General urges, the federal constitution inhibits state taxation of liquor sales made for resale at federal enclaves, California's gallonage tax on the sales made for resale in Yosemite Park would have been invalidated by this court instead of sustained.

Mississippi's wholesale "mark-up" is an inescapable aspect of its statutory wholesaling monopoly. When, under the options given by Mississippi's regulations, the suppliers are willing to perform the wholesaling functions themselves, collect the wholesale "mark-up" from the military clubs and remit it to the state, for the privilege of importing alcoholic beverages into the state, the "mark-up" payments may be treated as an excise tax. But this makes no constitutional difference. The XXI Amendment, as the court below correctly held, authorizes the imposition of such a non-discriminatory burden on the business of retailing alcoholic beverages imported into the state, regardless of where these retail businesses are located or who conducts them. The federal government has no constitutional right to conduct a retail alcoholic beverage business at any federal enclave within the borders of any state, free of such economic burdens as the state may impose on the importation of such beverages into the state for its own control and revenue purposes.

The question of whether a state may license such a federally authorized retail business when conducted on a federal enclave within its borders was not considered by the court below. When the clubs refused to apply for retailer's permits, Mississippi did not try to enforce this requirement and the legality of the permit requirement may only be decided by further litigation. All that is presented here is the legality of Mississippi's control over the importation of bottled wines and spirits destined for resale at a profit.

No policy reasons have been suggested by the Solicitor-General for letting any federal agency escape the economic burdens incidental to state control when it chooses to resell alcoholic beverages at a profit, either by the drink or in packaged form. Nor are any policy reasons suggested for distinguishing between retail businesses

conducted by domestic military clubs under a uniform federal regulation, expressly applicable to all, merely because some acts ceding the land where they operate, grant more federal jurisdiction than others grant.

None of the statements as to jurisdiction in any of the acts of cession here involved, says anything about control of alcoholic beverage abuse. The XXI Amendment, which antedated all of these acts, gave Mississippi continuing right to control the terms of alcoholic beverage importation for resale within the borders of the state. The Solicitor-General's suggestion that the word "use" in the amendment excludes commercial use and means only individual consumption betrays an extraordinary indifference to the amendment's purpose in history. It has produced a steady state by state elimination of consumption controls in favor of commercial regulation. While these systems of state commercial regulation differ widely, they all recognize the controls on personal consumption seriously compromise individual liberty. One reason for the XXI Amendment is that a United States Justice Department concerned with who drank what and where turned out to be an unappealing spectacle.

CONCLUSION

Appellee respectfully submits that the judgment of the United States District Court for the Southern District of Mississippi be affirmed and the appeal dismissed.

Respectfully submitted

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Certificate

I, Guy N. Rogers, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Motion to Affirm or Dismiss to Honorable Erwin N. Griswold, Solicitor-General of the United States, Department of Justice, Washington, D. C. 20530, this the 26th day of September A. D., 1972.

Guy N. Rogers
Assistant Attorney General

APPENDIX A

In the United States District Court for the
Southern District of Mississippi
Jackson Division

(Civil Action No. 4554)

United States of America, Plaintiff,

v.

State Tax Commission of the State of Mississippi; Arny Rhoden, Chairman; Jimmy Walker, Excise Commissioner; Woodley Carr, Ad Valorem Commissioner; Kenneth Stewart, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. Summer, Attorney General, State of Mississippi; and the State of Mississippi, Defendants

Filed March 24, 1972, Southern District of Mississippi.

Robert C. Thomas, *Clerk*

Opinion of the Court

Before CLARK, *Circuit Judge;* RUSSELL, *Chief District Judge;* and COX, *District Judge.*

CLARK, *Circuit Judge*:

This court must harmonize the constitutional grant of power, on the one hand, to Congress to make rules for the government and regulation of the Armed Services and to legislate with regard to lands purchased for military bases with the prohibition on power, on the other hand, contained in the XXI Amendment, to transport or import intoxicating liquors into a state for delivery *or use therein*

in violation of state law. Since both the affirmative and negative provisos are parts of the supreme law of the land, the realtive status of the two sovereigns involved in this collision of claimed authority becomes immaterial. Rather, we must reconcile the power granted with the power prohibited. Reduced to its simplest terms, our ultimate holding is that the general article I, § 8, and article IV, § 3, clause 2, grants to the Congress of legislative and regulatory powers are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction.

The United States filed this action seeking declaratory and injunctive relief against enforcement of a statewide regulation requiring distillers and suppliers of alcoholic beverages to collect, over and above the purchase price, a percentage sum designated as a wholesale mark-up on their liquor sales to certain military organizations located on bases in the State of Mississippi. In addition, the United States sought to recover the total of all such payments made by these military purchasers. Jurisdiction of the action is founded on 28 U.S.C.A., §§ 1345 and 2281. The matter comes on for disposition on cross motions for summary judgment based upon interrogatories and answers and a stipulation of facts.

The State of Mississippi ceded and the United States acquired exclusive jurisdiction over lands within the state comprising Keesler Air Force Base and the United States Naval Construction Battalion Center. Mississippi also ceded and the United States accepted concurrent jurisdiction over lands comprising the Columbus Air Force Base

and Meridian Naval Air Station. On the premises of each of these military installations authorized personnel operate clubs, post exchanges, package stores and other similar facilities which sell packaged liquors to classes of persons delineated by military directive. These alcoholic beverages are obtained directly from distillers and suppliers located outside the State of Mississippi who ship such goods into such bases. Not only is no contention made that the consumption or use of such beverages is restricted to the military installations where purchased, but the proof shows further that: numerous classes of non military persons are authorized to make purchases; and every selling facility exacts a promise from each purchaser that he will obey the laws of the state as to such of the liquor bought as may be taken off of the installation. All of these military post facilities are operated with funds derived from dues and profits and none depends upon funds appropriated by the government of the United States.

Prior to July 1, 1966, the laws of the State of Mississippi wholly prohibited the sale or possession of alcoholic beverages in that state. On that date Mississippi enacted a local option alcoholic beverage control law. *Miss. Code Ann.*, §§ 10265-01, et seq. (1942). This enactment imposed regulatory control over the sale of alcoholic beverages within the state in such a manner as to require all liquor purchases to be made through a state-owned warehouse. The law vested the administration of its provisions in the Alcohol Beverage Control Division of the Mississippi State Tax Commission.

This ABC Division promulgated a regulation, numbered 22 (now renumbered 30), which provides that installations selling alcoholic beverages on military reservations are to be exempted from state taxes and are given an option to order alcoholic beverages direct from the

distiller, in lieu of their right under the law to make purchases from the state warehouse, but providing that in the event of the exercise of such option the direct selling distiller should collect and remit to the state the same wholesale mark-up on whiskey of 17% and on wine of 20% as charged by the state-owned warehouse.

Subsequent to the promulgation of this regulation, all distillers and suppliers of alcoholic beverages to facilities on the Mississippi bases named above collected the wholesale mark-up specified by the regulation and remitted these collections to the ABC Division of the State Tax Commission.

The plaintiff asserts that Mississippi's regulation unconstitutionally interferes with the federal procurement policy authorized by Congress and embodied in an implementing Department of Defense directive. It takes the position that Congress has conferred upon the Secretary of Defense the power to regulate the purchase, sale and use of intoxicating liquors at or near military installations by the enactment of 50 U.S.C.A. App., § 473, which provides:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps.

and that the Secretary of Defense implemented this authorization by issuing Department of Defense directive 1330.15 (32 C.F.R., § 261.1-261.5). That directive establishes department policy governing the purchase, as well

as the sale, of alcoholic beverages by all components of the Armed Services through on-base outlets. Under the heading "General Policy Statements," the directive contains a subdivision entitled "Cooperation," composed of the following paragraphs:

> 1. [The Department of Defense] will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise.*
>
> 2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control. (Emphasis supplied.)

On June 9, 1966, the directive was amended by deleting the italicized words in ¶ 1.

The defendants make the following contentions. Payment of the wholesale mark-up required by the ABC regulation does not unduly burden the military function. Since mark-ups were passed on to customers and no assignment has been obtained from these customers to the United States, no damage claim can be maintained by it. Congress, in enacting § 473, did not intend to confer upon the Department of Defense the right to create regulations for the *purchase* of packaged liquor contrary to state law, but rather intended only to authorize liquor sales and use regulation at or near bases. The 1966

amendment to the Department of Defense directive was intended to clarify the state's right to control prices. The federal government should not have the status of a sovereign to sell liquor since such sales are not a function of sovereignty. All federal interests were acquired at times when Mississippi law forbade the sale or possession of whiskey, and Mississippi's present regulatory statutes are merely different forms of this prohibitory enactment and still apply on all federal enclaves as to purchases by the type of organizations involved here, which operate with non-appropriated funds.

In reasoning our decision, we shall assume, without deciding, that the legislative powers vested in Congress by article I, § 8, clauses 14 and 17, and article IV, § 3, clause 2, have been exercised, through delegation to the Department of Defense, in language broad enough to pre-empt all state control of liquor sales prices. This assumption focuses our attention on whether the XXI Amendment forbids the exercise of this congressional power in such a manner as to authorize the sales involved in the case at bar to be consummated contrary to state law.

The procedure we are required to follow has been defined by the Supreme Court. Our analysis must give full play to each of the constitutional provisos "in the light of the other and in the context of the issues and interests at stake". *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed2d 350 (1964).

The pertinent parts of article I, § 8 of The Constitution provide that the Congress shall have power to make rules for the government and regulation of the land and naval forces and to exercise exclusive legislative authority over all territories purchased with the consent of a state for an armed forces base. Section 2 of the XXI Amendment is posed in these sparse and exact words:

"The transportation or importation into any state . . . of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." It is undisputed that the law of the State of Mississippi authorizes the wholesale mark-up exactions on the liquor sales involved. We are therefore required to determine if the XXI Amendment applies, i.e. did the purchases to which the mark-up was added involve transportation of liquor into Mississippi for delivery or use therein?

We will first consider the status of such transactions by the clubs and exchanges located on Keesler Field and on the Naval CB Base. These two military establishments are enclaves over which exclusive jurisdiction has been ceded by Mississippi and accepted by the United States. These lands are to Mississippi as the territory of one of her sister states or a foreign land. They constitute federal islands which no longer constitute any part of Mississippi nor function under its control. The importation of property onto these bases for use thereon would clearly be outside the ambit of the XI Amendment. *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed 1502 (1938); *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 (1944). For example, in the Yosemite Park case the Supreme Court opined that while the XXI Amendment had increased the state's power to deal with intoxicating liquors, it did not increase the state's jurisdiction. The court stated:

> As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive

jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.

In the case before us now however, the transportation of liquor to these bases was not solely for delivery and use on the military installations. The undisputed facts show that it was acquired for the purpose of being sold to individuals for their use and consumption either on the base or in the surrounding state. *Cf. Johnson* v. *Yellow Cab Co., supra* at 386. The mere fact that the sales transactions took place on the military installation does not serve to insulate the club's right to purchase from the prohibition of the XXI Amendment. That Amendment replaced unworkable nationwide prohibition under the XVIII Amendment with a form of local option prohibition or control. The effect of allowing a club to import liquor into a federal enclave and sell it there for use in the surrounding state would be identical to the effect of allowing a club to establish a package liquor store in a civilian shopping center near the military station. Both such liquor sales schemes would be subject to state law.

A fortiori, the liquor sales made on the two bases over which the federal and state governments exercise concurrent jurisdiction—Meridian and Columbus —are similarly subject to Mississippi law. Lands which are ceded and accepted with concurrent jurisdiction reserved to the state do not become federal enclaves within the state. Contrary to the situation that exists where exclusive federal jurisdiction cessions are made, such concurrently governed lands remain a part of state territory, subject only to the unblemished authority vested in the federal government to carry out the exclusively federal functions for which the areas were acquired. This reasoning

finds firm support in the simultaneously decided milk regulation cases of *Pacific Coast Dairy v. Dept. of Agriculture of California,* 318 U.S. 285, 63 S. Ct. 628, 87 L. Ed. 761 (1943), and *Penn Dairies v. Milk Control Commission of Pennsylvania,* 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943). In *Penn Dairies* the Court held a state milk control commission could fix milk prices for contracts made within an Army encampment that was under the state's concurrent jurisdiction, even though the milk purchased was for military use. The *Pacific Coast Dairy* decision reached just the opposite result—no right of state price control —because the contracts there were made and the milk sales transactions occurred on an enclave exclusively regulated by the federal government. Except for the concurrent and exclusive jurisdictional features of the bases involved, the facts in these cases were identical. Thus, as to the concurrent jurisdiction bases, the liquor sales transactions occurred within the jurisdiction of the State of Mississippi, even where the consumption or other use of liquor was consummated within the territorial confines of the base.

We do not attempt to say that Congress holds less than exclusive legislative authority over a military base ceded and accepted on a concurrent jurisdictional grant, Article I, § 8, clause 17, as interpreted by *Paul* v. *United States,* 371 U.S. 245, 263, 83 S.Ct. 426, 9 L.Ed. 2d 292 (1943), *Penn Dairies* v. *Milk Control Commission, supra* and *Pacific Coast Dairy* v. *Dept. of Agriculture, supra,* make that right clear. No assertion of power by a state can detract from the federal government's single undivided constitutional power over such a composite federal-state area, except in the instance of the state's constitutional prerogative to enact binding legislation concerning liquor delivered to and used on such a base. This exception

obtains, not by dint of state power alone, but rather because the Constitution itself has been amended to make it so. It is the power which flows through the XXI Amendment to operate on the facts in the case at bar that serves to distinguish this case from the milk regulations involved in *Paul* and *Pacific Coast Dairy*.

It is now well-established that while the XXI Amendment does not abrogate the commerce clause, it does limit the ambit of the power of the United States thereunder to the extent of forbidding it to use the commerce clause as a justification for importing intoxicating liquor into a state for delivery and use therein in violation of the laws of the state. *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936); *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939); *Carter* v. *Commonwealth of Virginia*, 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605 (1944). While we recognize that the Amendment operates only as a prohibition on power to violate state legislation which regulates intrastate use and distribution and does not serve to extend the laws of the state to reach conduct beyond its borders, *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945), the case here involves an assertion of federal power which, in and of itself, violates the Amendment. This cannot be permitted for it would render impossible any harmonious interpretation of the constitutional document as a whole. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, *supra*, and *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed 2d 366 (1966). *Cf. Barnett* v. *Bowles*, 151 F.2d 77 (Emergency Ct. App. 1945); *Dowling Bros. Distilling Co.* v. *United States*, 153 F.2d 353 (6th Cir. 1946). In *Barnett* the court ap-

proved the imposition of pricing controls on unlawful liquor sales within the State of Mississippi at a time when the laws of the state totally prohibited commerce in such a commodity. The court, however, was careful to point out "The Emergency Price Control Act does not authorize or purport to authorize the sale or transportation or importation for delivery or use of intoxicating liquors into any state in violation of state laws. We find here no conflict in the operation of state and national regulation of intoxicating liquors."

Our decision that the XXI Amendment makes Mississippi law applicable to these transactions makes it unnecessary for us to decide such matters as whether the ambit of the enabling statute will support the Department of Defense regulation, the meaning of the 1966 amendment to those regulations, whether the method of payment followed by the clubs and exchanges here amounted to unrecoverable voluntary payments, the effect of Mississippi's enactment of its ABC law on the prior cessions to the federal government, the effect of the non-appropriated fund status of these organizations, or whether an assignment of right by individual purchasers or club members to the United States would be a prerequisite to the maintenance of this action. Since our opinion is placed on a basis relating solely to territorial jurisdiction it is also unnecessary to analyse the respective federal and State interests at stake in operating clubs and post exchanges vis-a-vis highway safety and other civilian community problems.

The defendants are entitled to summary judgment on all issues.

United States District Court, Southern District of Mississippi, Jackson Division

(Civil Action No. 4554)

United States of America, plaintiff

v.

State Tax Commission of the State of Mississippi, et al., defendants

Filed March 24, 1972, Southern District of Mississippi.

Robert C. Thomas, *Clerk*

Special Concurring Opinion

I share the views so well expressed by Judge Clark in the opinion in chief in the captioned case, but feel impelled to inject my thoughts on some principles additionally involved and of controlling effect in this case. A voluntary payment may not be recovered in any suit at law as a universal principle of American jurisprudence. A mere protest is not sufficient to change that principle. Where the payer is not in custody, or his property is not seized, or potentially capable of being seized by a payee, and no principle of coercion or duress exists, a payment is voluntary and cannot be recovered even though the payer protests the payment, and even though the payer knows the facts and actually believes that he owes the payee nothing.

Voluntary Payment

A voluntary payment by a person not then a debtor may not be recovered back. There is no evidence in this record before the Court to show aught but that

these payments of these overriding percentages on liquor and wine were made by these clubs to get these alcoholic beverages without sales tax as authorized by 4 U.S.C.A. § 105 and at a specially reduced rate on wine. This is not a claim for a refund of a payment made under any kind of fraud or duress of person or property, but such payment in each instance was made initially to secure the sale and delivery of these alcoholic beverages from the manufacturer upon such payment to it of the markup price in another state.

As to such a payment, *Richfield Oil Corporation* v. *United States,* (9CA) 248 F.2d 217, 223 says: "The mere fact that payment was made under express protest, is not sufficient to prevent the payment from being a voluntary one which cannot be recovered back. As stated in Pure Oil Co. v. Tucker, 8 Cir., 164 F.2d 945, 947: 'It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance. This is true even though the payor makes the payment * * * under protest * * *.'"

Likewise, in *United States* v. *Eastport Steamship Corporation,* (2CA) 255 F.2d 795 it is said that in the absence of fraud or duress or mistake of fact, or a reservation agreement, that a party cannot pay a claim and later sue to recover the amount paid, but that the doctrine is applicable only when the recovery is sought of a sum previously paid. See *Cooperative Refinery Association* v. *Consumers Public Power District,* 190 F. 2d 852; *Strimling* v. *Stone,* 193 F.2d 990; *Bowles* v. *J. J. Schmitt & Co.,* 170 F.2d 617.

In Mississippi a party cannot recover money voluntarily paid with a full knowledge of all of the facts, al-

though no obligation to make such payment existed. *Oscar Hope* v. *S. W. Evans,* Smedes & Marshall Chancery (1843) 195.

As a general rule, a voluntary payment with full knowledge of the facts cannot be recovered. *Town of Wesson* v. *Collins,* 18 So. 360; *McLean* v. *Love,* 157 So. 361. That rule applies as well in equity as to law. *O. C. Tiffany & Co.* v. *Johnson & Robinson,* 27 Miss. 227. Payment is voluntary where there is no duress or necessity of making payment to free person or property from legal restraint. *Schmittler* v. *Sunflower County,* 125 So. 534, Suggestion of Error overruled 126 So. 39. The Court in *Schmittler* said: "A payment is voluntary in the sense that no action lies to recover back the amount, not only where it is made willingly and without objection; but in all cases where there is no compulsion or duress nor any necessity of making the payment as a means of freeing the person or property from legal restraint or a grasp of legal process."

In *Security Nat. Bank of Watertown, S.D.* v. *Young, County Treasurer, et al,* (8CA) 55 F.2d 616, 619, certiorari denied 52 S.Ct. 502 provides: "True, it is alleged that the taxes were paid under protest, but this is not sufficient to save the payment from being voluntary in the sense which bars a recovery of the taxes paid, if it was not made under any duress, compulsion, or threats, or under the pressure of process immediately available for the forcible collection of the tax. Railroad Co. v. Dodge County Commissioners, 98 U.S. 541, 25 L. Ed. 196; Gaar, Scott & Co. v. Shannon, 223 U.S. 468, 32 S.Ct. 236, 56 L. Ed. 510; United States v. New York & Cuba Mail S.S. Co., 200 U. S. 488, 26 S.Ct. 327, 50 L. Ed. 569; Chesebrough v. United States, 192 U. S. 253, 24 S. Ct. 262, 48 L. Ed. 432."

In *Dennehy* v. *McNulta,* (7CCA) 86 Fed. 825, the Court said the goods were legitimate subjects of trade and there was no illegality in the nature or the character of purchase. On the contrary, his purchase, so far as appears, was in exact compliance with both his expectations and his bargain. The Court said: "There can be no recovery of money so paid, for the reason that no actual duress is shown, and no element exists to make the payment involuntary or compulsory." *Radich* v. *Hutchins,* 95 U.S. 210, 213; *Lonergan* v. *Buford,* 13 S.Ct. 684. In *Radich,* the Court said: "'To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is that "a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid." Mayor, etc. v. Lefferman, 4 Gill, 425; Brumagin v. Tillinghast, 18 Cal. 265; Mays v. Cincinnati, 1 Ohio St. 268.' In the case at bar neither the persons nor the property of the purchaser were within the physical control of the sellers when the contract of purchase were entered into, or when the payments were made thereupon, and in the eye of the law the transactions were voluntary."

In *Putnam Tool Company* v. *United States,* 147 F. Sup. 746, United States Court of Claims, certiorari denied 78 S. Ct. 3 provides: "We think that the plaintiff's payment to the government was a voluntary payment, in the legal sense, and that it cannot recover a part of it in this suit. * * * One cannot, in the absence of fraud or

duress or mistake of fact or reservation agreement, or, perhaps, other special circumstances, pay a claim and later sue to recover the amount paid. The plaintiff alleges, as we have said, that there was compulsion upon it which caused it to pay the claim." The compulsion involved was interest on a large indebtedness. The court said that "the fact that interest will or may accrue upon a claim, if it is not paid, is not legal duress which will make its payment recoverable."

In *United States* v. *Eastport Steamship Corporation,* (2CA) 255 F.2d 795 provides: "Under the doctrine of voluntary payment 'One cannot, in the absence of fraud or duress or mistake of fact or reservation agreement, or, perhaps, other special circumstances, pay a claim and later sue to recover the amount paid.' The doctrine is applicable only when recovery is sought of a sum previously paid. *McKnight* v. *United States,* 1878, 98 U.S. 179 25. L.Ed. 115, affords an excellent illustration. In that case the Government had paid a sum of money to the assignees of a contractor to whom the Government was indebted. Subsequently, replying upon the undisputed invalidity of the assignment, the Government sought to recover the amount paid. Recovery was denied on the ground of voluntary payment.

In *Little* v. *Bowers, Comptroller,* 10 S.Ct. 620, 621: "In *Wabaunsee Co.* v. *Walker,* 8 Kan. 431, cited with approval in *Lamborn* v. *Commissioners,* 97 U.S. 181, and also in *Railroad Co.* v. *Commissioners,* 98 U.S. 541, 543, it was said: 'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back.

And the fact that the party, at the time of making the payment files a written protest, does not make the payment involuntary.' "

In *United States* v. *William Edmondston,* 21 S.Ct. 718, 722 provides: " 'This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Department; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the government, without claim of any right to retain one penny of it.' It is clear from these references that this court has distinctly and constantly recognized the doctrine that where there has been a voluntary payment of money, using that term in its customary legal sense, the money so paid cannot be recovered, and also that that doctrine applies to cases in which one of the parties is the government, and that money thus voluntarily paid to the government cannot be recovered."

In *United States* v. *New York & Cuba Mail Steamship Co.,* 26 S.Ct. 327, 329: "And, expressing the principle to be applied, the court said, in the Chesebrough Case, 24 S.Ct. 262, 'even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment.' " * * * "It is stated in Union P.R. Co. v. Dodge County, 98 U.S. 541, 25 L. ed. 196, and quoted from that case in Little v. Bowers, 134 U.S. at page 554, 33 L. ed. at page 1019, and 10 Sup. Ct. Rep. at page 621, as follows: 'Where a party

pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back.' "

The United States Is Not a Preferred Litigant

The funds sought to be recovered belong to the members of service clubs on United States bases in Mississippi. None of it was derived, or made possible by any appropriation of public money. The United States by statute has the right to sue therefor just as would the club itself, but it has no preferential advantage as a litigant over the real party in interest. The Supreme Court of the United States many years ago said that the United States as a litigant appears in its own court with the same rights and the same responsibilities as the humblest litigant.

In *Lacy* v. *United States,* (5CA) 216 F.2d 223, 225 says: "The Government when applying for relief in a court of equity is as much bound to do equity as is a private litigant. United States v. Belt, D.C., 47 F. Supp. 239, vacated 319 U.S. 521, 63 S.Ct. 1278, 87 L.Ed. 1559, affirmed 79 U.S.App.D.C. 87, 142 F.2d 761; United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 338, 26 S.Ct. 282, 50 L.Ed. 499; Daniell v. Sherrill, Fla., 48 So.2d 736, 737, 23 L.R.A.2d 1410. 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.' Luckenbach S.S. Co. Inc. v. The Thekla, 266 U.S. 328, 339, 340, 45 S.Ct. 112, 113, 69 L.Ed. 313."

In *United States* v. *Maryland Casualty Company,* (5CA) 235 F.2d 50, 53 says: "Beseeching the Court on

equitable terms for leave to intervene, the Government is and ought to be treated as would be any other suitor, for '* * * when government invokes the aid of the court as a litigant it stands as any other litigant * * *', Jones v. Watts, 5 Cir., 142 F.2d 575, 577, 163 A.L.R. 240, certiorari denied 323 U.S. 787, 65 S.Ct. 310, 89 L.Ed. 628; In re Minot Auto Co., 8 Cir., 298 F. 853, 857."

In *Guaranty Trust Co. of New York* v. *United States,* 58 S.Ct. 785 says: "Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. Luckenbach S.S. Co. Inc. v. The Thekla, 266 U.S. 328, 340, 341, 45 S.Ct. 112, 113, 69 L.Ed. 313; United States v. Stinson, 197 U.S. 200, 205, 25 S.Ct. 426, 49 L.Ed. 724; The Davis, 10 Wall. 15, 19 L.Ed. 875; The Siren, 7 Wall. 152, 159, 19 L.Ed. 129. As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts."

91 C.J.S. 420 teaches: "The rights of the United States are ordinarily measured by the same rules as those of a private litigant."

This Is Not a Suit for a Debt Owing to the United States

This is a suit which the United States has a right to bring as a sovereign under the circumstances, but it is not the real party in interest in such funds, and if recovered, will not be covered into the general fund of the United States Treasury. Not one dime of this money ever come from public revenue.

Although the United States has the right to sue the employer under the wage and hour law to recover

back wages due according to the act, it cannot be said that the debt is one due the United States within the meaning of 31 U.S.C.A. § 191 and, therefore, entitled to priority under the bankrupt act. *Nathanson* v. *National Labor Relations Board,* 73 S.Ct. 80, 82 the Court said: "It does not follow that because the board is an agency of the United States, any debt owed it is a debt owing the United States within the meaning of R.S. § 3466." The Court further said: "There is no function here of assuring the public revenue. The beneficiaries of the claims are private persons as was the receiver in *American Surety Co.* v. *Akron Savings Bank,* 212 U.S. 557, 29 S.Ct. 686, 53 L.Ed. 651."

These Clubs Were Actually Subject to the State Sales Tax

But they procured an exemption from the state sale tax on hard liquor and wine and mixed drinks very much to their advantage by this contractual arrangement which allowed them the privilege of buying their alcoholic beverages outside Mississippi with a specified markup price considered fair by the parties at the time. The fact that these clubs contemplated operation upon government enclaves provided no exemption, and particularly when the government itself had no responsibility therefor.

In *James, as State Tax Commissioner of West Virginia* v. *Dravo Contracting Co.,* 302 U.S. 134, 58 S.Ct. 208, 218: "In Union P. Railroad Co. v. Peniston, 18 Wall. 5, 33, 36, 21 L.Ed. 787, the Court said: 'It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States.' "

The Transactions in Suit Occurred and the Funds Accrued Not on Any Enclave in Mississippi, But Outside Mississippi in Each Instance

There is no statute or decision which exempts these bases from these arrangements whereby they purchased these alcoholic beverages in other states from these wholesalers at an agreed markup price to the wholesalers. It was the wholesaler and not the clubs that paid these markup prices to the State Tax Commission in exchange for the right to sell these products in other states for resale in Mississippi.

In *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California, et al,* 63 S.Ct. 628, the dairy sold milk to the Quartermaster's Department at Moffett Field at less than the minimum price fixed for the area. Congress refused to authorize the Armed Services to refuse bids for milk below the California Milk Stabilization Law price. Moffett Field operated under the exclusive jurisdiction of the government. The exclusive character of jurisdiction at Moffett Field is conceded. The Court said that contracts to sell and sales consummated within the enclave cannot be regulated by California law. The Court observed that on this day in *Penn Dairies* v. *Milk Control Commission,* 63 S.Ct. 617, that a different decision is required where the contract and sales occur within a state's jurisdiction, absent specific national legislation excluding the operation of the state's regulatory laws. The Congress has the power to protect its exclusive jurisdiction on the enclave but not elsewhere unless expressly so provided.

Accordingly, for the reasons stated in the opinion in chief and for the additional reasons stated herein, the complaint in this case is without merit and should be dismissed with prejudice without any assessment of costs.

HAROLD COX
U. S. District Judge

March 20, 1972.

APPENDIX B

United States District Court
Southern District of Mississippi
Jackson Division

United States of America,
Plaintiff,

v.

State Tax Commission of the State of Mississippi; Arny Rhoden, Chairman; Jimmie Walker, Excise Commissioner; Woodley Carr, Ad Valorem Commissioner; Kenneth Stewart, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. Summer, Attorney General, State of Mississippi; and the State of Mississippi,
Defendants.

Complaint

The United States of America alleges the following:

1. The Court has jurisdiction of this action under 28 U.S.C. 1345.

2. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

3. The lands comprising Keesler Air Force Base, the United States Naval Construction Battalion Center, Co-

lumbus Air Force Base and the Meridian Naval Air Station were purchased by the United States with the consent of the State of Mississippi.

4. The State of Mississippi ceded to the United States and the United States accepted exclusive jurisdiction over the lands comprising Keesler Air Force Base and the United States Naval Construction Battalion Center; and Keesler Air Force Base and the United States Naval Construction Battalion Center are situated on lands over which the United States has exclusive jurisdiction.

5. The State of Mississippi ceded to the United States and the United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station; and Columbus Air Force Base and the Meridian Naval Air Station are situated on lands over which the United States and the State of Mississippi have concurrent jurisdiction.

6. The officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmens' Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—Closed, Chief Petty Officers' Mess—Open, Enlisted Mens' Club, and the Navy Exchange Department of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—Open, the Commissioned Officers' Mess—Closed, the Commissioned Officers' Mess—Open, the Navy Exchange Enlisted Mens' Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are Instrumentalities of the United States operating with nonappropriated funds, are entitled to the sovereign immunities and privileges of the United States, are located in the State of Mississippi and are or have been engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments

concerned. These agencies are referred to hereinafter as "Instrumentalities of the United States."

7. Under its enumerated powers concerning regulation of land and naval forces and military reservations pursuant to Art. I, Sec. 8, Cl. 14 of the Constitution of the United States, the Congress, in Section 6 of the 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473, authorized the Secretary of Defense "to make such regulations as he may deem appropriate governing the sale, consumption, possession of or traffic in * * * intoxicating liquors to or by members of the Armed Forces at or near any camp * * * or other place primarily occupied by members of the Armed Forces * * *."

8. Pursuant to the above cited authority, the Secretary of Defense issued Department of Defense Directive 1330.15 dated 4 May 1964, 32 CFR 261.4(c). This Directive requires that the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government of the United States the most advantageous contract, price and other factors considered.

9. The Armed Services Procurement Act, 10 U.S.C. 2305 (c) requires that a contract be granted to the bidder whose bid "will be the most advantageous to the United States, price and other factors considered." Although the Act applies only to appropriated fund activities of the Armed Services of the United States, its requirement that procurement be at the most advantageous price has been adopted by the Secretary of Defense in said Directive as the governing procurement policy for the aforesaid Instrumentalities of the United States.

10. The Directive and procurement policy adopted from the Act referred to in Pars. 8 and 9 hereinabove require

the aforesaid Instrumentalities of the United States engaged in the purchase of alcoholic beverages for resale to obtain said alcoholic beverages at the lowest competitive price most advantageous to the United States.

11. The State of Mississippi Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265-01 et seq., enacted July 1, 1966, imposes strict regulatory control on the possession and sale of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

12. Sec. 10265-01 et seq. of the Mississippi Code (1942) Annotated, was enacted after the United States obtained jurisdiction over the lands upon which the aforesaid Instrumentalities of the United States are situated, all as described in paragraphs 4 and 5 hereinabove.

13. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission promulgated Regulation No. 22 entitled "Sales to Military Post Exchanges, etc., effective September 1, 1966," hereinafter referred to as Regulation 22, which attempts to regulate, tax and control Instrumentalities of the United States located in the State of Mississippi, which are engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned.

14. Regulation 22 requires the aforesaid Instrumentalities of the United States to order alcoholic beverages direct from the distiller and/or supplier or to purchase them from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

15. Regulation 22 further requires the aforesaid Instrumentalities of the United States to pay a seventeen percent "mark-up" on distilled spirits and a twenty per

cent "mark-up" on wine, whether purchases are made directly from the distiller or from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission. These "mark-ups" are percentages of the normal wholesale purchase price and are added on to such purchase price.

16. When purchasing alcoholic beverages from distillers or suppliers, the State of Mississippi requires the aforesaid Instrumentalities of the United States to pay the aforementioned "mark-ups" to the distillers and/or suppliers and said distillers and/or suppliers to collect said "mark-ups" and in turn remit them directly to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

17. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission requires that the "mark-ups" be paid by the aforesaid Instrumentalities of the United States when making purchases directly from distillers and/or suppliers although the State does not handle the merchandise in connection with such purchases, does not provide any facilities, and does not perform any services in connection with such purchases, the net result of Regulation 22 being that the so-called "mark-ups" are in fact taxes.

18. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission is not a party to purchases by the aforesaid Instrumentalities of the United States from distillers and/or suppliers.

19. Regulation 22 requires distillers and/or suppliers which sell alcoholic beverages to the Instrumentalities of the United States located in the State of Mississippi, to strictly observe said regulation and any distiller and/or supplier who fails or refuses to strictly observe Regulation 22 is considered to have violated the Alcoholic Beverage Control Laws of the State of Mississippi and is promptly

deprived of the benefits of same including the right to sell his products to the Alcoholic Beverage Control Division, the sole authorized wholesaler in the State of Mississippi; and in addition thereto he may be prosecuted for violation thereof and subjected to criminal penalties therefor. As a result distillers and/or suppliers, fearful of losing the opportunity to sell their products to the agencies of the State of Mississippi and fearful of criminal prosecution, have refused and continue to refuse to sell their products to the aforesaid Instrumentalities of the United States without collecting from these Instrumentalities the so-called "mark-up" percentages and remitting them to the said Division.

20. As a condition for doing business in the State of Mississippi distillers and/or suppliers are required to furnish the Alcoholic Beverage Control Division of the State a price list and to agree not to sell to any of the aforesaid Instrumentalities of the United States at a lower price than to the State of Mississippi.

21. Defendants have sought to require each of the aforesaid Instrumentalities of the United States to obtain an alcoholic beverage permit from the Alcoholic Beverage Control Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi.

22. Defendants are prohibited by the Federal Constitution from regulating, taxing and otherwise controlling the procurement of liquor by Instrumentalities of the United States located in the State of Mississippi.

23. The aforesaid Instrumentalities of the United States have made these "mark-up" payments under protest to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission either directly or indirectly through distillers and/or suppliers in an amount in excess of $319,740.51 since September 1966 and continue to do so under protest.

24. The acts of the defendants aforementioned have caused damage to the aforesaid Instrumentalities of the United States in an amount in excess of $319,740.51 and will continue in a proportionate amount or more for the foreseeable future. Such sums paid and to be paid legally belong to the aforesaid Instrumentalities of the United States and not to defendants and the collection thereof constitutes an unjust enrichment to the defendants at the expense of the aforesaid Instrumentalities of the United States.

25. Regulation 22, as applied to purchases by the aforesaid Instrumentalities of the United States, is illegal and void and is prohibited by the Constitution of the United States because: (a) it is in conflict with the procurement policy established for Instrumentalities of the United States by the Secretary of Defense pursuant to authority vested in him by an Act of Congress; (b) it invades and interferes with the exercise of powers expressly delegated by the Constitution of the United States to the Congress; (c) it infringes the Federal Government's immunity from taxation by the States; and (d) the State of Mississippi is without jurisdiction to apply its laws to the lands upon which the aforesaid Instrumentalities of the United States are situated.

Wherefore, the United States respectfully prays that:

1. In accordance with 28 U.S.C. 2284(1), this Court immediately notify the Chief Judge of the United States Court of Appeals for the 5th Circuit that this is an action to restrain the enforcement of an order made by an administrative board or commission acting under state statutes upon the ground of unconstitutionality within the meaning of 28 U.S.C. 2281, and request him to designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action.

2. Upon hearing of this action, Regulation 22 be declared null and void and defendants, their officer, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be enjoined and restrained from regulating, taxing or controlling purchases of alcoholic beverages by Instrumentalities of the United States, aforementioned hereinabove, located in the State of Mississippi, either directly or indirectly through distillers and/or suppliers doing business with the United States.

3. Upon hearing of this action, there be a judgment in favor of the United States of America and against all defendants jointly and severally in the sum of $319,740.51 with interest according to law until paid, which sum has heretofore been paid under protest to defendants directly or indirectly as alleged; and there be a further judgment in favor of the United States of America and against defendants jointly and severally in a sum certain equal to the amount which the aforesaid Instrumentalities of the United States may pay in the future to defendants under protest directly or indirectly in excess of the $319,750.51 already paid to date as stated hereinabove.

.....
United States Attorney

.....
Assistant United States Attorney

Verification

City of Washington }
District of Columbia } ss.

Major Thomas V. Ball, being duly sworn, deposes and says:

That he is an air force officer on active duty, assigned to the Office of the Judge Advocate General, United States

Air Force; that he is authorized to act herein and to make verification on behalf of plaintiff herein; that in accordance with the duties of his office, he has read the foregoing complaint and that the matters therein alleged are true as affiant is informed and verily believes.

Major Thomas V. Ball

Subscribed and sworn to before me this 14th day of October, 1969.

Audrey Ann Crump
Notary Public

My commission expires Aug. 31, 1971.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-350

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-23a) is reported at 340 F. Supp. 903.

JURISDICTION

The judgment of the district court (J.S. App. 24a) was entered on March 30, 1972. A notice of appeal to this Court (J.S. App. 25a-26a) was filed on May 1, 1972. On June 22, 1972, Mr. Justice Powell extended the time for docketing the appeal to and including August 29, 1972, and on that date the jurisdictional

statement was filed. Probable jurisdiction was noted on November 13, 1972 (App. 58).

The government instituted this action seeking: (1) a declaration that a statewide regulation was void because unconstitutional, (2) an injunction against state officials restraining the regulation, taxation, or control of purchases of alcoholic beverages by instrumentalities of the United States, and (3) a judgment for the amount previously paid under protest pursuant to the challenged regulation (App. 5–11). Accordingly, a three-judge district court was properly convened pursuant to 28 U.S.C. 2281 (*King* v. *Smith*, 392 U.S. 309, 312, n. 3), and this Court has jurisdiction under 28 U.S.C. 1253.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers and suppliers to collect "wholesale markups" on liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within Mississippi and to remit these "markups" to the Tax Commission. The questions presented are:

1. Whether the Twenty-First Amendment authorizes Mississippi to regulate the importation of liquors into territory over which it has ceded exclusive jurisdiction to the United States.

2. Whether the Mississippi regulation imposes an unconstitutional state tax on instrumentalities of the United States.

3. Whether the regulation is invalid because it conflicts with federal procurement regulations and policies.

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATION INVOLVED

1. Article I, section 8, of the United States Constitution provides in part:

> The Congress shall have Power * * *
> To raise and support Armies, * * *;
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> * * * * *
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

2. Article IV, section 3, provides in part:

> * * * * *
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

3. Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

4. Section 10265–18(c) of the Mississippi Local Option Alcoholic Beverage Control Law, Miss. Code Ann. (Cum. Supp.) 10265–18(c), provides:

> The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic

beverage, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at wholesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act.

* * * * *

5. Section 10265–106 of the Mississippi Local Option Alcoholic Beverage Control Law, Miss. Code Ann. (Cum. Supp.) 10265–106, provides in part:

* * * * *

The Commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states.

6. Regulation 25 of the Mississippi State Tax Commission provides:

Post exchanges, ship stores, and officers' clubs located on military reservations and operated

by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

STATEMENT

The material facts are not in dispute.[1] Mississippi prohibited the sale or possession of alcoholic beverages until 1966. In that year, it adopted a local (county) option policy subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages. Miss. Code Ann. (Cum. Supp.) 10265–01, *et seq.* The Commission was authorized to sell to licensed retailers in the state "including, at the discretion of the Commission, any retail dis-

[1] The case was submitted on a stipulation of facts (App. 28–41).

tributors operating within any military post * * * within the boundaries of the State, * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes of this act." Miss. Code Ann. 10265–18 (c) (p. 4, *supra*). The statute directed the Commission to add to the cost of alcoholic beverages a "mark-up" which in its judgment would be adequate to cover the cost of wholesaling, to provide a reasonable profit, and to render prices competitive with those in neighboring states. Miss. Code Ann. 10265–106 (p. 4, *supra*).

Pursuant to this authority, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. The regulation requires, on direct orders from such military facilities, that distillers collect and remit to the Commission the latter's "usual wholesale markup." During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine (App. 37; J.S. App. 4a).

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on the four military bases in Mississippi had purchased liquor from distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (App. 35–36). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are federal en-

claves; exclusive jurisdiction over these lands was ceded to the United States by Mississippi, which retained only the right to serve civil and criminal process thereon. Miss. Code Ann. 4153, 4154. See App. 28–29; J.S. App. 3a, 7a. On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the State exercise concurrent jurisdiction (App. 29; J.S. App. 3a, 29a).

Soon after the Mississippi regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the "markup" was improper. The military authorities also attempted to pay the amounts for the "markup" into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the "markups" on their military sales to the Commission, the distillers would be subject to criminal prosecution (see Miss. Code Ann. 10265–112) and to delisting, *i.e.*, loss of the privilege of selling to the Commission for retailing in Mississippi (App. 36–38). To obtain liquor, therefore, the military facilities were required by the distillers to pay the "markup." By July 31, 1971, $648,421.92 had been paid under protest to suppliers outside Mississippi for such "markups" (App. 38).

The United States instituted this action on November 3, 1969, seeking a declaration that the regulation is unconstitutional, an injunction against its continued enforcement, and a judgment for the amount already paid for "markups."

The district court granted summary judgment against the government. It held that the constitutional grants of authority to Congress to establish and regulate military forces and to exercise jurisdiction over lands belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (J.S. App. 2a). With respect to liquor sold by the drink on the four bases, the court made no express holding, but its judgment denied all relief to the government. Judge Cox added in a concurring opinion that a refund of the "markup" was also barred because those payments had been voluntarily made (J.S. App. 13a–23a).

SUMMARY OF ARGUMENT

I

Mississippi has no power under the Twenty-first Amendment to impose its "markup" with respect to the transportation of liquor from out-of-state distillers to the two military bases over which the United States exercises exclusive jurisdiction. The Amendment is inapplicable because, under its language, the liquor is not imported "into any State * * * for delivery or use therein." Even if otherwise applicable, the Amendment cannot support the regulation be-

cause it conflicts with the superior constitutional grant of power to Congress to regulate federal enclaves.

A. Under Article I, Section 8, Clause 17, Congress is given the power to "exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State" for the erection of military or other structures. This exclusive legislative power, even in the absence of specific action by Congress, bars state regulation of the price of goods sold to military clubs and exchanges on federal enclaves. *Paul* v. *United States,* 371 U.S. 245.

The lands constituting two of the four Mississippi bases—Keesler and Naval Construction—were acquired by condemnation with the express consent of the Mississippi legislature. We think that acquisition by condemnation constitutes a "purchase" within the meaning of Clause 17. But even if it does not, the transfer of legislative power was completed by Mississippi's statutory cession, and the United States' acceptance, of exclusive jurisdiction over the lands acquired. *Paul* v. *United States, supra.* Mississippi's 1966 "markup" regulation, adopted more than 15 years after the transfer of sovereignty was effected, is therefore barred, with respect to the ceded lands, under Article I, Section 8.

B. The result is not different here because of the Twenty-first Amendment. Section 2 of the Amendment, which prohibits the "importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof * * *," affords Mississippi wide latitude to legislate with respect to

alcoholic beverages in the State. It provides no authority, however, to regulate the importation of liquor from out-of-state distillers onto the two military bases over which the United States has exclusive jurisdiction. This is so because the transaction involves neither an importation of liquor "into any State," nor "delivery or use" within the State. All sales are made on the base to authorized personnel.

Collins v. *Yosemite Park Co.*, 304 U.S. 518, controls this aspect of the case. The Court there held that California could not require a company selling liquor within national park lands to apply for permits and pay taxes relating to its importation of liquor from out-of-state sources. As in *Collins*, the delivery and use of the liquor here is exclusively on lands over which the State has no jurisdiction. Although the court below found that some of the liquor sold on the bases here was consumed off the federal enclave, there is no reason to think that the same was not true in *Collins*. That alcoholic beverages purchased on the bases may be consumed off the bases does not give the State any added power to regulate the distiller's sales to the base.

Even if the distiller's sales to the facilities on the Keesler and Naval Construction bases could be viewed as involving importation of liquor into Mississippi for delivery or use therein, the Twenty-first Amendment could not support a regulation that conflicts with the exclusive congressional power under Article I, Section 8, Clause 17, to regulate federal enclaves. Because there is nothing in the history or language of the

Amendment to suggest that it was intended to diminish that exclusive congressional power, the Amendment must be subordinated to the specific conferral of authority in Article I. Cf. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341.

II

Even if Mississippi's regulatory authority under the Twenty-first Amendment extends to all four military installations, the particular regulation here imposes an unconstitutional tax on instrumentalities of the United States. The "markup" that Mississippi requires out-of-state distillers to collect from the military facilities is a tax in return for which no services are rendered by the State. And, though collected for the State by the distillers, the legal incidence of that tax falls on the military facilities which must pay it.

Those facilities are instrumentalities of the United States entitled to immunity from state taxation. Their mission—promoting the morale and efficiency of military personnel by providing recreational and social facilities—is necessary to the proper functioning of the armed forces. Although the facilities operate with nonappropriated funds, no person has a financial interest in their profits or assets, and all operating gains are passed on to patrons.

The immunity of these federal instrumentalities from state taxation is not vitiated merely because the "markup" regulation is related to alcoholic beverages. The immunity doctrine, established by *M'Culloch* v. *Maryland*, 4 Wheat. 316, is a fundamental constitu-

tional principle deeply rooted in the concept of federalism. There is nothing in the history of the Twenty-first Amendment to suggest a purpose to abrogate this firmly established constitutional rule; where the Amendment collides with it, the Amendment must give way (cf. *Department of Revenue* v. *James B. Beam Distilling Co., supra*), particularly where, as here, the State's interest is only in raising revenue and its regulation is only remotely related to the health and welfare of its citizens.

III

The regulation is also invalid, under the Supremacy Clause, because the "markup" requirement conflicts with federal procurement regulations and policies. In *Paul* v. *United States, supra,* 371 U.S. at 252, this Court invalidated a state minimum price regulation for milk as applied to military installations which were directed by statute and regulation to purchase on the "most advantageous" terms, "price, quality, and other factors considered." Under the Supremacy Clause, "the state policy of regulated prices" was subordinated to "the federal policy of negotiated prices."

The regulations governing the purchase of alcoholic beverages for military installations reflect a similar federal policy, with which Mississippi's "markup" conflicts. Congress, pursuant to its powers to recruit and maintain the armed forces and to regulate military affairs, has given the Secretary of Defense broad authority to regulate the purchase and sale of alcoholic beverages for military installations, and the Secretary

has directed that purchases "shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." By inflating prices some 20 percent, the Mississippi "markup," like the state price regulation in *Paul,* frustrates the federal procurement policy of securing the most favorable terms. Under the Supremacy Clause, therefore, the state regulation is invalid.

Again, the Twenty-first Amendment, designed only to reinforce the states' authority over the public health and welfare and not to qualify the congressional authority over military affairs, must yield to the explicit grants of power to Congress to govern the armed forces of the United States.

ARGUMENT

I

MISSISSIPPI HAS NO POWER UNDER THE TWENTY-FIRST AMENDMENT TO REGULATE THE IMPORTATION OF INTOXICATING LIQUORS INTO THE TWO BASES OVER WHICH THE UNITED STATES HAS EXCLUSIVE JURISDICTION

A. THE UNITED STATES HAS EXCLUSIVE LEGISLATIVE POWER OVER TWO OF THE BASES UNDER ARTICLE I, SECTION 8, CLAUSE 17, OF THE CONSTITUTION

Article I, Section 8, Clause 17, of the Constitution empowers Congress to "exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." In *Paul* v. *United States,* 371 U.S. 245, the Court held

that this clause barred the enforcement of a California minimum price regulation with respect to milk purchased out of nonappropriated funds by military installations in the State for resale at commissaries, military clubs, and post exchanges. The Court held that the California statute could not constitutionally be applied to such sales even though there was no conflicting federal regulation, because "the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action" (371 U.S. at 263). See, also, *Pacific Coast Dairy, Inc.* v. *Department of Agriculture,* 318 U.S. 285, upon which the Court relied in *Paul,* holding that California could not revoke the license of a milk dealer who sold milk below the statutory minimum to a military installation located on a federal enclave. The Court in *Paul* also ruled that "[s]ince a State may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws" (371 U.S. at 268).

The principle announced in *Paul* governs the present case. The lands constituting the Keesler and Naval Construction bases were "purchased by the Consent of the Legislature" of Mississippi. The State by statute has expressly given its "consent * * * in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution o f the United States,

to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state * * * for * * * other public buildings."[2] The United States acquired the lands by condemnation between 1940 and 1949,[3] and formally accepted exclusive jurisdiction, pursuant to 40 U.S.C. 255,[4] by letters from War Department officials to the governors of Mississippi during 1942 to 1950 (App. 28–29).

---

[2] Miss. Code Ann. 4153 provides:

"§ 4153. United States may acquire land for certain purposes

"The consent of the state of Mississippi is given, in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state which has heretofore been or may hereafter be acquired for custom houses, post offices, or other public buildings."

[3] See App. 28–29 and Exhibits 1–3 to the stipulation of facts.

[4] This section provides in part:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

We think acquisition by condemnation is a "purchase" within the meaning of clause 17, and that Mississippi's statutory consent to "acquisition by * * * condemnation" therefore constituted a transfer of sovereignty. But even if the acquisition was not a "purchase," the district court found (J.S. App. 3a) and Mississippi apparently concedes (Motion to Affirm or Dismiss, p. 5), that the State ceded to the United States exclusive jurisdiction over the lands composing the two bases, retaining only the right to serve process thereon. Mississippi's express cession of "exclusive jurisdiction * * * over any land * * * acquired by the United States" for public buildings[5] was by itself sufficient to complete the transfer and give Congress sole authority over the lands. *Paul* v. *United States, supra,* 371 U.S. at 264; *Fort Leavenworth R.R. Co.* v. *Lowe,* 114 U.S. 525, 531, 541–542.[6]

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[5] Miss Code Ann. 4154 provides:

"§ 4154. Jurisdiction

"The exclusive jurisdiction in and over any land which has heretofore been, or may hereafter be, so acquired by the United States is hereby ceded to the United States for all purposes, except that the state retains the right to serve thereon all civil and criminal processes issued under authority of the state; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands, for the purposes hereinabove set forth."

The reference of the section is to the purposes stated in Section 4153, *supra*, note 2.

[6] Where the federal government's acquisition is not a purchase with the consent of the state legislature, "it was held in *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U.S. 525, 541, 542, that a State could complete the 'exclusive' jurisdiction of the Federal Government over such an enclave by 'a cession of legislative authority and political jurisdiction.'" *Paul* v. *United States, supra*, 371 U.S. at 264.

Once the United States had acquired the lands and accepted Mississippi's cession of jurisdiction, Article I, Section 8, Clause 17, "by its own weight, bar[red] state regulation * * *" (*Paul, supra*). Since exclusive federal jurisdiction attached to these lands by 1950 and since in ceding jurisdiction the State reserved authority only to serve process thereon, the State's 1966 regulation "was not enforceable on a federal enclave in [Mississippi] because it was adopted 'long after the transfer of sovereignty'" (*Paul, supra*, 371 U.S. at 268–269).

B. THE TWENTY-FIRST AMENDMENT DOES NOT EMPOWER THE STATE TO REGULATE THE IMPORTATION OF ALCOHOLIC BEVERAGES INTO THESE TWO BASES

Paul, of course, did not involve the Twenty-first Amendment, section 2 of which prohibits the "transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof * * *." But this provision does not authorize Mississippi to regulate the importation of intoxicating liquors onto the two military bases over which the United States has exclusive jurisdiction. The State does not have that authority, because such importation is not "into [the] State * * * for delivery or use therein" as those terms are used in the Twenty-first Amendment, and because the Twenty-first Amendment was not intended to modify the exclusive jurisdiction over federal enclaves which Congress has under Article I, Section 8, Clause 17.

1. *The Amendment is inapplicable because the transaction between the out-of-state distiller and the mili-*

*tary facility is not "importation into any State * * * for delivery or use therein of intoxicating liquors."*

a. The court below properly recognized that, apart from the reserved right to serve process (J.S. App. 7a):

> These lands [Keesler and Naval Construction] are to Mississippi as the territory of one of her sister states or a foreign land. They constitute federal islands which no longer constitute any part of Mississippi nor function under its control.

It follows, as the court below acknowledged (J.S. App. 7a–8a), that "[t]he importation of property onto these bases for use thereon would clearly be outside the ambit of the XXI Amendment." This is the settled rule established by *Collins* v. *Yosemite Park Co.*, 304 U.S. 518. In that case a company operating hotels, stores, and camps in Yosemite National Park, under contract with the Secretary of the Interior, sought to enjoin the enforcement of a California liquor law which would have required the company to apply for permits and pay fees and taxes relating to its importation of alcoholic beverages for storage and sale within the park. Because "jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California,[7] * * * [and as] there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory

[7] Unlike Mississippi, California in its cession of jurisdiction over the park land had expressely reserved "the right to tax persons and corporations, their franchises and property on the lands included in said parks" (304 U.S. at 525, n. 9).

provisions as are found in the Act * * * are unenforceable in the Park" (304 U.S. at 530). The Court rejected the State's argument that the Twenty-first Amendment gave it the right to place conditions upon the importation of intoxicating liquors into park land within its borders (304 U.S. at 538):

> As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a district sovereignty. Where exclusive jurisdiction is in the United States without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.

While the Court in *Collins* upheld the fees and taxing aspects of the California statute, that was premised solely upon the State's express reservation of the right to tax when it ceded the lands to the United States (see note 7, *supra*).

Collins thus stands for the proposition that, in the absence of an express reservation, the State derives no power from the Twenty-first Amendment to regulate, whether by licensing, taxes, or other conditions, the importation of liquor into lands over which the United States has acquired exclusive jurisdiction. See, also, *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383.*

* In *Johnson*, Oklahoma state officers seized liquor in transit from an out-of-state source to consignees at Fort Sill, a military reservation within Oklahoma's boundaries. The carrier from whom the liquor was seized sued for its return. The Court noted that the state officials did not and could not claim

This is because the Amendment was designed only to permit the States to legislate with respect to alcoholic beverages, pursuant to their normal authority over public health, welfare, and morals, free from the constraints of traditional Commerce Clause limitations. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330; *California* v. *LaRue*, No. 71–36, decided December 5, 1972, slip op. at 5–6. The amendment does *not* expand the territorial jurisdiction of any State. *Collins* v. *Yosemite Park Co.*, *supra*, 304 U.S. at 538. Where liquor is not delivered or used within a State, the health, welfare, and morals of its citizens are not implicated, and the "broad sweep" of the Amendment (*California* v. *LaRue*, *supra*, slip op. at 5) [9] does not come into play.

b. We submit that *Collins* controls this case. Just as the importation of out-of-state liquor for delivery and sale within the exclusive federal enclave of Yosemite National Park was not importation "into California within the meaning of the Twenty-first Amendment" (304 U.S. at 535), so here the importation of out-of-state liquor into the military facilities over which the United States has exclusive jurisdiction was not importation into Mississippi. Similarly, since the "use"

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that "Oklahoma has power to control liquor transactions on the Fort Sill Reservation," because the State had ceded to the United States "whatever authority it ever could have exercised in the Reservation" (321 U.S. at 385).

[9] In *California* v. *LaRue*, this Court upheld a state regulation proscribing certain forms of entertainment in licensed bars and nightclubs. The case thus involved "state regulation in the area covered by the Twenty-first Amendment" (slip op. at 6). There was no question there, as there is here, of the State's territorial jurisdiction over the establishments regulated.

made of the imported liquor by the purchasing facility, like that of the Yosemite Park Company, is storage and sale within the base, the importation cannot properly be characterized as for "delivery or use" in Mississippi.

c. The court below distinguished *Collins* on the ground that there the "delivery and use [was] in the Park" (304 U.S. at 538), whereas here some of the liquor is consumed off base. In the court's view, "[t]he mere fact that the sales transactions took place on the military installation does not serve to insulate the club's right to purchase from the prohibition of the XXI Amendment" (J.S. App. 8a). The court erred, however, both in its reading of *Collins* and in its conclusion that off-base consumption by purchasers could justify state regulation of the transaction between the distiller and the military facility.

The Court in *Collins* did state that the "delivery and use [of the alcoholic beverages] is in the Park" (304 U.S. at 538); it did not suggest, however, that all the liquor brought into the park was actually consumed there as well. The record in *Collins,* like the record here, does not reveal the extent to which liquor sold on the federal lands was consumed in the State.[10]

[10] Liquor sold by the drink is, of course, ordinarily consumed on the premises. The record contains nothing concerning the extent to which packaged liquor is consumed elsewhere than on the bases. The district court inferred that some of the liquor is consumed off base because limited classes of nonmilitary persons are authorized to make purchases and because each selling facility requires purchasers to agree to obey state laws with respect to liquor consumed off base (J.S. App. 3a).

The effect of the court's judgment, however, is to permit "markups" on all liquor purchased for sale on the bases, in-

But the complaint in *Collins* acknowledged that liquor was sold "for consumption on or off the premises where sold" (Transcript of Record, p. 3, No. 870, O.T. 1937), and there is no reason to think that some was not consumed outside the park in California.[11]

The correct understanding of the Court's statement in *Collins,* therefore, is that, with respect to the transaction between the out-of-state manufacturer or distributor and the Yosemite Park Company, the "delivery" of the liquor and its "use" (*i.e.,* its storage and sale) occurred exclusively within the park. That some of the liquor might later be taken from the park by purchasers and "used" by them in California would not give the State authority to regulate the importation into the park. It would only permit the State to regulate the transportation of liquor from the park into California and its consumption there.

The analysis is identical here. The liquor purchased by the military facilities from out-of-state distillers is sold exclusively within the confines of the bases. The "delivery" and "use," with respect to that transaction, is therefore on federal lands and not in Mississippi. While the State may establish a regulatory

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cluding liquor sold by the drink and packaged liquor consumed on the bases. There is no foundation for such a conclusion, and at the very least a remand would be required here to determine the proportion of liquor sales that result in off-base consumption.

[11] This court's statement in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, that the shipment in *Collins* was "destined for distribution and consumption in a national park," apparently used the word "consumption" in the broad sense of retail purchase of consumer goods.

mechanism to ensure either that no liquor is taken from the bases or that any liquor leaving the bases is subjected to a "markup" charge, it cannot interfere with the sale and delivery of out-of-state liquor to facilities on the federal enclaves. Thus, contrary to the view of the court below, the fact that the sales take place on base *does* insulate the distiller-seller transaction from state regulation under the Twenty-first Amendment. Mississippi's power under that Amendment is limited to the regulation of the importation or use of the liquor in Mississippi by individual purchasers.

The State would, of course, have "wide latitude for regulation * * *." *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 42; *California* v. *LaRue, supra*, slip op. at 7. But there is no basis in this record for an assertion—not made by the court below—that the "markup" on the distiller-seller transaction is the only effective means of regulating the subsequent importation and use by individual purchasers. And even if the record demonstrated such a need, it is difficult to see why that would justify an otherwise impermissible extension of Mississippi's territorial jurisdiction. Surely if the liquor were being transported from Tennessee through Mississippi for delivery and sale by retailers in Louisiana, Mississippi would not and could not impose a "markup" on those transactions simply because some of the liquor might be brought by individual purchasers from Louisiana into Mississippi for consumption. Instead, Mississippi would be limited to regulating the actual importation into the

State by the individual purchasers, even if such direct regulation were difficult to accomplish effectively.[12] We think the same principles govern this case.

Since, therefore, Section 2 of the Twenty-first Amendment does not apply to the transactions between the distillers and the facilities on the Keesler and Naval Construction bases, Mississippi was without authority to regulate those transactions by imposing its "markups." Cf. *Humble Pipe Line* v. *Waggonner*, 376 U.S. 369; *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U.S. 285.

2. *Even if the Twenty-first Amendment might otherwise apply to the transactions here, it must yield to the superior authority of Congress to regulate federal enclaves.*

Even if it be assumed that there is an importation of liquor into Mississippi for delivery or use therein so that the Twenty-first Amendment might otherwise be applicable, that Amendment must yield here to the congressional authority to regulate federal enclaves. This Court held in *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, that,

[12] Although the Twenty-first Amendment is inapplicable to liquor shipments destined for federal enclaves or other states, Mississippi can exercise its police power to regulate such shipments while they are passing through her territory. *Duckworth* v. *Arkansas*, 314 U.S. 390; *Carter* v. *Virginia*, 321 U.S. 131. To be valid, however, such police regulation must be "in the interest of preventing * * * unlawful diversion [of the liquor] into the internal commerce of the State." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333. Here, as in *Idlewild*, there is no evidence that any liquor has been diverted, and there is no claim that such diversion is the basis of the "markup" requirement.

because nothing in the language or history of the Twenty-first Amendment suggests a repeal of the export-import clause (Article I, Section 10, Clause 2), a state law conflicting with that clause was invalid notwithstanding the State's invocation of the Amendment. Here, too, the state regulation is invalid because it conflicts with the "explicit and precise" (377 U.S. at 346) constitutional grant to Congress of exclusive regulatory authority over federal enclaves and because nothing in its language or history implies a modification of Article I, Section 8, Clause 17.

The aim of the Amendment, as reflected in the congressional debates, was to confer upon the States the power—preempted by the federal government in the Eighteenth Amendment—to regulate commerce by individuals in alcoholic beverages notwithstanding potential Commerce Clause limitations. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329–331. The sponsor of the resolution that became the Twenty-first Amendment explained that it would restore "to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Senator Blaine). See, also, 76 Cong. Rec. 4145, 4170, 4219 (remarks of Senators Wagner, Borah, and Walsh).

Decisions of this Court establish that the Twenty-first Amendment does not supersede "all other provisions of the United States Constitution in the area of liquor regulations" although "the broad sweep" of the Amendment confers "something more than the

normal state authority over public health, welfare, and morals." *California* v. *LaRue,* No. 71–36, decided December 5, 1972, slip op. at 5, 6.[13] The primary impact of the Amendment is upon the Commerce Clause; yet, even there, although the Amendment was intended to remove "traditional Commerce Clause limitations" restricting state regulation of liquor, this Court has emphasized that the Amendment has not "obliterate[d]" that clause. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* 377 U.S. at 329, 330. See also *Heublein, Inc.* v. *South Carolina Tax Commission,* No. 71–879, decided December 18, 1972, slip op. at 7–8, n. 9; *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171.

Just as the Twenty-first Amendment yielded in *Beam* to the export-import clause, so here it must give way to the specific and exclusive power of Congress to govern federal lands.

II

THE MISSISSIPPI REGULATION IMPOSES AN UNCONSTITUTIONAL TAX ON INSTRUMENTALITIES OF THE UNITED STATES

The fundamental principle that federal instrumentalities are immune from state taxation was first

[13] Unlike this case, where the State's regulation is meant only to raise revenue, *California* v. *LaRue* involved an effort by the state liquor commission to eliminate criminal and immoral behavior associated with the consumption of alcoholic beverages in establishments with certain forms of entertainment. There is here no such focus upon the welfare or morals of Mississippi's residents.

stated in *M'Culloch* v. *Maryland*, 4 Wheat. 316, where the Court struck down a state tax on the Bank of the United States. Although the reaches of that principle have expanded and contracted over the years,[14] the principle itself has never been questioned by this Court.

The court below did not expressly consider whether the Mississippi regulation imposed a tax on a federal instrumentality, deeming a decision on that issue unnecessary in view of its holding that the regulation is permissible under the Twenty-first Amendment (J.S. App. 11a–12a). In our view of the case, however, a holding that the Twenty-first Amendment is applicable to the military bases here does not obviate the taxation issue, because where the Twenty-first Amendment collides with the tax immunity principle, it must yield.

1. There is little question that the regulation requiring a "markup" on liquor purchased by military facilities imposes a tax on instrumentalities of the United States. Although its terms suggest a price regulation, the "markup" requirement operates as a tax. It is collected by the Tax Commission not in return for any services with respect to the liquor sold to the military facilities (App. 36), but rather as "an enforced contribution to provide for the support of government." *United States* v. *LaFranca*, 282 U.S. 568, 572. Profits from the collection of "markups"

[14] See, *e.g.*, Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L .Rev. 633 (1945), and *The Remnant of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 757 (1945).

go into Mississippi's general revenues.[15] The appellees have accordingly conceded that "the 'mark-up' payments [collected from the military facilities] may be treated as an excise tax" (Motion to Affirm or Dismiss, p. 11).

Though the tax is paid directly by the distiller, the distiller acts only as a conduit in collecting the "markup" from the military facility. Like a state sales tax which must be collected by the seller from the purchaser and remitted to the State (see *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, 347), the "legal incidence of the tax" falls on the purchaser—here the military facility.

Finally, the military facilities on which the tax is laid are instrumentalities of the United States. In *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, and *Paul* v. *United States,* 371 U.S. 245, 261, this Court held that military post exchanges and commissaries are federal instrumentalities. Other courts have consistently held that the tax immunity of the United States applies to servicemen's clubs. *E.g., United States* v. *Query,* 37 F. Supp. 972 (E.D. S.C.), affirmed, 121 F. 2d 631 (C.A. 4), vacated on other grounds, 316 U.S. 486; *County of Culpeper* v. *Etter,* 231 F. Supp. 999

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[15] Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 4–5. See Miss. Code Ann. 10265–115:

* * * * *

All taxes received by the Commission under this act shall be paid into the general fund as required by law. Any funds derived from the sale of alcoholic beverages in excess of inventory requirements shall be paid not less often than annually into the general fund.

(E.D. Va.); *Maynard & Child, Inc.* v. *Shearer*, 290 S.W. 2d 790 (Ky.); *Florida ex rel. C.P.O. Mess* v. *Green*, 174 So. 2d 546 (Fla.).[16] The appellees thus properly conceded in the district court that "[e]ach

[16] See, also, *Grant* v. *United States*, 271 F. 2d 651 (C.A. 2); *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4); *Lowe* v. *United States*, 185 F. Supp. 189 (N.D. Miss.), affirmed, 292 F. 2d 501 (C.A. 5); *United States* v. *Forfari*, 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 902; *Rizzuto* v. *United States*, 298 F. 2d 748 (C.A. 10); *Jaeger* v. *United States*, 394 F. 2d 944 (C.A. D.C.).

The status of post exchanges and other nonappropriated fund activities as instrumentalities of the United States is recognized also in 5 U.S.C. 2105(c).

It therefore cannot be said that the United States has consented to the Mississippi "markup" tax. It has given a general consent in 4 U.S.C. 105 to the imposition of "any sales or use tax" in federal areas, and "sales or use tax" is defined as "any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property * * *" (4 U.S.C. 110(b)). But that consent is qualified by 4 U.S.C. 107(a), which provides that Section 105 "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof * * *."

The decision in *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, is not to the contrary. The Court there stated, in a case to which the United States was not a party, that Florida could impose upon milk distributors a gallonage tax on milk distributed by them, including a portion sold to military installations within the State. In holding that 4 U.S.C. 105 was a consent to the tax so far as the federal government was concerned, the Court distinguished situations like that here, where "the tax was deemed to fall upon the facilities of the United States or upon activities conducted within these facilities" (375 U.S. at 382). The tax in *Polar* was on "the activity of processing or bottling milk in a plant located within Florida" (*ibid.*); the tax here falls upon the United States and attaches to the sale and delivery of liquor within the military facilities.

of these clubs is an instrumentality of the United States." [17]

The appellees have sought to avoid the conclusion that the "markup" is a tax on a federal instrumentality by characterizing the clubs as "a federally authorized retail business" (Motion to Affirm or Dismiss, p. 11). Even if the characterization were accurate, the clubs would still be immune from State taxation because

> * * all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. * * * And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. [*Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 477.]

In fact, however, the clubs, open messes, and package stores at the four Mississippi bases are not retail businesses. They are organized and operated pursuant to Air Force and Navy regulations, with an assigned mission of promoting the morale and efficiency of military personnel by providing lodging, dining, social, and recreational facilities (AFM 176–3, ¶1-1; NAVPERS 15951, ¶101).[18] They are not operated for

[17] Defendants' Opposition to Plaintiff's Cross Motion for Summary Judgment, p. 2.

[18] The applicable regulations are a part of this record, appearing as Exhibits 19 (AFR 176-1), 20 (AFM 176-3), and 21 (NAVPERS 15951) to the stipulation of facts.

the profit of any person or group (AFM 176–3, ¶8–3; NAVPERS 15951, ¶103(b)), and no individual has any financial or proprietary interest in the assets of the clubs (AFR 176–1, ¶13(a); NAVPERS 15951, ¶103(b)). Although the clubs are required to be self-sustaining, any operating gains are passed along to patrons in the form of reduced prices or dues (AFM 176–3, ¶8–3; NAVPERS 15951, ¶¶1005, 1009). And, though operated with nonappropriated funds, the clubs perform activities necessary to the proper functioning of the armed forces. Cf. 32 C.F.R. 538.1(c)(1).[19]

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[19] *Ohio* v. *Helvering*, 292 U.S. 360, upon which the appellees rely (Motion to Affirm or Dismiss, p. 7), is thus inapposite. The Court there upheld a federal tax on liquor dealers as applied to state liquor stores which sold to the general public for a profit. "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned" (292 U.S. at 369). See, also, *South Carolina* v. *United States*, 199 U.S. 437.

The military clubs here are engaged not in a profit-making enterprise as a "trader" with the general public but rather in the sovereign endeavor of maintaining the morale and efficiency of the armed forces.

This Court has recognized, moreover, that a state's immunity from federal taxation stands on a different footing than federal immunity from state taxation. See, *e.g.*, *Helvering* v. *Gerhardt*, 304 U.S. 405, 412–415; *New York* v. *United States*, 326 U.S. 572, 577 (opinion of Frankfurter, J.). "That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning * * *." *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 478. See *M'Culloch* v. *Maryland*, 4 Wheat. 316, 435–436:

"The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme."

2. If, as we have shown, the "markup" regulation imposes a tax on a federal instrumentality which, in the absence of the Twenty-first Amendment, would be unconstitutional, the remaining question is whether the subject matter of the tax—alcoholic beverages—vitiates the constitutional immunity. When a State's power to regulate alcoholic beverages under the Twenty-first Amendment collides with a conflicting interest under the Constitution, "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332. In our view a consideration of the Twenty-first Amendment in light of the fundamental constitutional principle of federal tax immunity, and in light of the interests at stake in this case, indicates that the tax imposed here cannot stand.

Though the Constitution contains no clause providing federal tax immunity, this Court has recognized from the start that the doctrine is deeply rooted in the concept of federalism. The state tax struck down in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 425, was "in its nature incompatible with, and repugnant to, the constitutional laws of the Union." Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared" (*id.* at 436). This doctrine has been aptly described as "one of the cornerstones of our constitutional law." *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610.

To sustain the Mississippi "markup" as applied to military clubs would require a holding that the Twenty-first Amendment abrogated the tax-immunity principle so far as intoxicating liquor is concerned. Cf. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 345. One would expect that before the Congress and the state legislatures were to alter so fundamental an incident of federalism they would have clearly expressed the intention to do so. Yet nothing in the language of the Amendment or in its history suggests even an awareness of that consequence, much less a purpose to accomplish it.

The principal objective of the Amendment was to free the States to regulate commerce in alcoholic beverages without Commerce Clause constraints (see pp. 25–26, *supra*). In the House, it was recognized that the Amendment would not alter the principles of federalism. Repeal of the Eighteenth Amendment "does not seek to change the fundamental law which was subscribed to by Washington, Franklin, Madison, Hamilton and the other immortals of the Constitutional Convention," but rather would be a "return to the federated Republic which they founded * * *." 76 Cong. Rec. 4513 (remarks of Representative Beck). See, also, 76 Cong. Rec. 4514, 4520 (remarks of Representatives Dyer and Cole). It was noted also that the Twenty-first Amendment would be of financial advantage to the United States, which could eliminate the expense of enforcing prohibition while at the same

time raising tax revenues on liquor. See 76 Cong. Rec. 4148, 4508, 4510 (remarks of Senator Wagner and Representatives Rainey and Lichtenwalner). No offsetting loss of federal tax immunity was mentioned.

Where the Twenty-first Amendment was invoked to support a state law which conflicted with the export-import clause (Article I, Section 10, Clause 2), this Court, concluding that the language and history of the Amendment do not suggest a repeal of the clause, held that the Amendment is subordinate. *Department of Revenue* v. *James B. Beam Distilling Co., supra.* On the same analysis, the Amendment must yield here to the fundamental principle that a state may not tax an instrumentality of the United States.

This is particularly so in the circumstances of this case, for the "markups" imposed by Mississippi are not designed to protect the health, welfare, or morals of its citizens but rather to raise revenue by taxing liquor sales to military personnel. Were the Mississippi measure related to the health or welfare of its citizens and were the federal instrumentality engaged in a less significant enterprise than promoting the morale and efficiency of the armed forces, the resolution of the constitutional issue might be a more difficult one. Applying the tax immunity doctrine here, however, does not interfere with the kind of state regulation that the Twenty-first Amendment was principally designed to protect. Cf. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 333–334.

III

THE MISSISSIPPI REGULATION IS INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT CONFLICTS WITH FEDERAL PROCUREMENT REGULATIONS AND POLICY

Paul v. *United States, supra,* further indicates that the Mississippi regulation is invalid under the Supremacy Clause because it conflicts with federal procurement regulations and policies. In addition to its ruling with respect to the application of Article I, Section 8, Clause 17, to milk purchased by military installations with nonappropriated funds (see pp. 13–17, *supra*), the Court in *Paul* also invalidated the application of California's minimum price regulation to milk purchased by those installations with appropriated funds. That application of the California regulation was invalidated under the Supremacy Clause because it conflicted with federal procurement law and policy, which required price competition "so that the United States may receive the most advantageous contract" (371 U.S. at 253). The Court stated (*ibid.*):

> While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law.

There was accordingly, the Court held, a clear and acute "collision between the federal policy of negoti-

ated prices and the state policy of regulated prices."

The federal procurement regulation involved in *Paul* reflected "a policy 'to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered'" (371 U.S. at 252). The regulation tracked the general procurement statute, which applies only to payments out of appropriated funds (10 U.S.C. 2303(a)), requiring that awards be made "to the responsible bidder whose bid * * * will be the most advantageous to the United States, price and other factors considered." 10 U.S.C. 2305(c). That regulation, the Court held, "directs that negotiations or, wherever possible, advertising for bids shall reflect active competition" (371 U.S. at 253).

The regulations governing the procurement of alcoholic beverages for military installations similarly reflect a federal policy of requiring that the United States purchase this product at "the most advantageous contract" (*Paul, supra,* 371 U.S. at 252). Although there is no specific federal statute governing the procurement involved in this case, since it is made from nonappropriated funds, Congress has authorized the Secretary of Defense to regulate "the sale, consumption, possession of or traffic in" liquor on military bases. 50 U.S.C. App. 473.[20] Pursuant to this broad authority, the

[20] The section provides:

"The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp,

Secretary has promulgated regulations establishing a uniform Defense Department policy governing the purchase and sale of alcoholic beverages. 32 C.F.R. 261.

Those regulations direct that "the purchase of all alcoholic beverages for resale at any * * * base * * * shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." 32 C.F.R. 261.4(c)(1).[21] This language closely parallels that of the general procurement regulation involved in *Paul,* which called for the "method of procurement which will be most advantageous to the Government—price, quality, and other factors considered" (371 U.S. at 252), and similarly reflects a federal policy that the government procure this commodity at the most advantageous price. The regulation governing the procurement of alcoholic beverages also states that, although it is the policy of the Defense Department to cooperate with local, state, and federal officials, such cooperation does not reflect "any legal

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station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both."

[21] The subsection provides in full:

"(c) *Cooperation.* (1) DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all

obligation to submit to State control." 32 C.F.R. 261.4 (c)(2).[22]

There is no question concerning the validity of this regulation. Inexpensive liquor is one of several economic benefits for servicemen which are designed to make enlistment attractive and to maintain high morale and efficiency in the Armed Forces (App. 40). Congress has broad authority under Article I, Section 8, to "raise and support Armies," to "provide

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alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered.

"(2) This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to State control."

[22] See note 21, *supra*. Prior to 1966, the regulation was even more explicit. It directed military facilities to obtain "the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise*." 32 C.F.R. 261.4(c)(1) (1966 rev.) (App. 32). The Defense Department memoranda (App. 42–57) recommending the deletion of the italicized clause show that the purpose was solely to correct the misunderstanding of some clubs that the clause barred them from procuring liquor from monopoly or control states even if the state price was the most advantageous. In explaining the change, the Assistant Secretary of Defense for Manpower stated: "[i]t would * * * remove any possible implication that negotiation with a state official must be avoided" (App. 57).

The amendment to the regulation thus left unchanged the basic procurement policy of seeking the lowest competitive price and the most favorable terms. It in no way implied a submission to state regulation or price control.

and maintain a Navy," and to regulate "the land and naval Forces," as well as authority under Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This power authorizes the Secretary of Defense, pursuant to his delegated authority, to regulate "the sale, consumption, possession of or traffic in" liquor on military bases, to require that procurement of liquor there be at the lowest possible price.

As in *Paul,* the state policy here conflicts with the federal policy. Like the minimum price regulation there, the "markup" here frustrates the federal objective of obtaining the most favorable terms; it artificially inflates by 17 to 20 percent the price at which the military facilities could otherwise obtain their liquor. In effect, it sets a floating minimum price level which is 17 to 20 percent above the "most advantageous" price.

In these circumstances, we submit that, apart from the Twenty-first Amendment, the Supremacy Clause would bar Mississippi from applying its markup regulation to the alcoholic beverages purchased by the two military installations over which the State and the United States have concurrent jurisdiction. In addition to the *Paul* case, see *Public Utilities Commission* v. *United States,* 355 U.S. 534, where the Court held that California could not prohibit common carriers from transporting government property at rates

other than those approved by its Public Utilities Commission, because that prohibition conflicted with government procurement law and regulations requiring negotiated rates and the use of the " 'least costly means of transportation' " (see 355 U.S. 542).[23] See, also, *Johnson* v. *Maryland,* 254 U.S. 51, invalidating a state law penalizing a Post Office employee for operating a government vehicle without a state license, and *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187, holding that a State may not require a government contractor to

[23] *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U.S. 261, is not to the contrary. The Court there upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at bid prices lower than the statutory minimum. The federal regulation there, unlike that here, contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority.' " See 318 U.S. at 277. It contained also provisions manifesting a "hands off" policy with respect to state minimum price laws. *Id.* at 276, 278. It was on this basis that the Court in *Paul* distinguished *Penn Dairies.* See 371 U.S. at 254–255.

To the extent that *Penn Dairies* required, before finding a conflict between federal and state policy, unambiguous "evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable" (318 U.S. at 275), we think the decision has been eroded by *Public Utilities Commission* and *Paul.* In both cases, the Court was able to discern such a conflict on virtually no stronger indication of congressional purpose than was deemed insufficient in *Penn Dairies.* See 355 U.S. at 547–548 (Harlan, J., dissenting); 371 U.S. at 270–283 (Stewart, J., dissenting).

obtain a license prior to executing the contract and performing construction work on an Air Force base within the State. As this Court stated in *Johnson,* a State may not impose "qualifications in addition to those that the Government has pronounced sufficient" (254 U.S. at 57).

The question, therefore, is whether the authority of the states under the Twenty-first Amendment to regulate traffic in alcoholic beverages prevails over the federal government's broad authority to govern the military forces. Once again, as in the case of the exclusive federal authority over enclaves under Article I, Section 8, Clause 17, we submit that the federal authority is paramount. There is nothing in the history of that Amendment to suggest that it was intended to diminish congressional authority to regulate military affairs. For the same reasons that the Twenty-first Amendment was subordinated to the export-import clause in *Beam, supra,* it must yield here to the "explicit and precise" (377 U.S. at 346) grants of authority to Congress to govern the armed forces and military installations of the United States.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded with directions to enter an appropriate decree.[24]

Respectfully submitted.

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JANUARY 1973.

[24] The concurring opinion below suggested that a refund would be barred here because the "markups" were paid voluntarily (J.S. App. 14a–19a). Refund suits, however, are a common method of challenging the validity of a tax. See *e.g.*, *Department of Employment* v. *United States*, 385 U.S. 355; *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341. The "mark-ups" here were paid under protest, and to deny the right to recover such payments if they are held to have been improperly exacted would depart from settled principles of fairness and restitution. See, *e.g.*, *Arkadelphia Milling Co.* v. *St. Louis, S. W. Ry. Co.*, 249 U.S. 134; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-350

UNITED STATES OF AMERICA, *Appellant*

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

On Appeal from the United States District Court for the Southern District of Mississippi

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BRIEF FOR THE APPELLEES

INTRODUCTION

The three judges below correctly and unanimously held that the 21st Amendment required dismissal of the complaint, even if it be assumed that the federal government has tried to pre-empt for itself, by legislative action, the terms on which alcoholic beverages are purchased for resale by military agencies. 340

F.Supp. 903, 906. One judge wrote a concurring opinion suggesting another sound ground for dismissal. In his opinion, the United States is complaining about a non-injurious alcoholic beverage retailer's burden that the military clubs voluntarily assumed for their own benefit. 340 F.Supp. 903, 912.

While this case is here only by virtue of the 21st Amendment issue, we feel bound to discuss briefly the matters that preclude a reversal of the decision below upon any ground. These are the non-injurious nature of Mississippi's regulation and the lack of any requirement in the applicable federal statutes and regulations that the military clubs avoid compliance with the state's regulation.

Our main argument will show that this Court's 21st Amendment decisions require affirmance. However, to reach the 21st Amendment question this Court must overlook serious discrepancies between the case tried below and the case posited in the government's brief. The trial was had on a complaint, answer and stipulation of facts, sometimes ignored in that brief.

COUNTER STATEMENT OF QUESTION PRESENTED

No issue was tried as to Mississippi's right to control any conduct at any military base. An initial attempt to require the clubs to obtain retailer's permits was abandoned before the complaint was filed. Stipulation, par. 14, App. 38. For the purposes of this case the exclusive right of the federal government to control conduct on any military base was and is conceded.

The complaint's only contested claim of exclusive jurisdiction was that the federal government had exclusive jurisdiction to control the terms on which alcoholic beverages were sold to two of the four Mississippi bases

involved in the suit. Par. 4, App. 5. The answer denied this allegation (App. 14) and the stipulation as to these bases merely recites the documents relied upon by the United States to establish such exclusive jurisdiction. Par. 3, App. 28-29. None of these documents, all dated during 1942-50, when Mississippi was a legally dry state, even suggest an intention on the part of Mississippi or the United States to abrogate or qualify the right granted by the 21st Amendment in 1933 to control the liquor traffic within state borders. Mississippi did not and does not concede that it gave away any 21st Amendment rights it had before it enacted its Local Option Alcoholic Beverage Control Law of July 1, 1966. Paragraphs 11 and 12 of the stipulation merely recite that this law was enacted after all four of the bases in question were acquired (App. 7).[1]

The complaint did not charge that any of the statutes or regulations involved, recited at paragraphs 13 through 19 (App. 7-9), had any different application at one base than another. The charge was that Mississippi is "prohibited by the Federal Constitution from regulating, taxing and otherwise controlling the procurement of liquor by instrumentalities of the United States located in the State of Mississippi." Par. 22, App. 9. The relief sought was a money judgment for a single total amount of all the markup payments made by all of those instrumentalities (Par. 3, Prayer, App.

[1] There is no reference in the stipulation to Sections 4153 and 4154 of the Mississippi Code, which appear in footnotes at pages 15-16 of the Government's brief. These sections deal only with federal acquisition of lands "for custom houses, post offices or other public buildings." They have nothing to do with federal acquisition of military bases.

10-11) and an injunction against future collection of the mark-up from any of them. Par. 2, Prayer, App. 10.

We submit that only a single constitutional question, if any, is presented by the government's appeal. Did the 21st Amendment authorize Mississippi to collect its wholesale mark-up on alcoholic beverage sales to military agencies for resale at bases in Mississippi?

ARGUMENT

I. The Complaining Clubs Were Not Burdened by the Challenged Regulation

The challenged regulation did more than apply a wholesaler's mark-up on military purchases for resale. It provided that all military orders "shall bear the usual mark-up in price but *shall be exempt from all state taxes.*" Emphasis ours. Stipulation, par. 11, App. 35. This exemption from the state's excise tax on distilled spirits was $2.50 per gallon.[2]

We do not know from this record what actual prices were paid by the clubs to suppliers. We do know that neither the clubs nor the United States performed any wholesaler function. The only allegation of the Complaint with respect to such functions is that Mississippi did not perform them on direct sales. Par. 17, App. 8. The only stipulation as to such functions is that Mississippi maintained the facilities needed for such functions, made them "available both to the military and other purchasers," was required by law to maintain them "whether they are utilized or not" and does

[2] Mississippi Code, 1942, Title 40, Sec. 102 65-104, headed Excise Taxes, levies a per-gallon tax, "to be collected from each retail licensee at the time of sale," of $2.50 on Distilled Spirits, $1.00 on Sparkling Wine and Champagne, and $.35 on Wine.

not transport, store, distribute, or perform any other direct service connected with purchases made direct from distillers outside the state. Par. 13, App. 36. When such direct purchases were made, the distillers had to perform the necessary wholesaling service. They were willing to do so in return for the privilege of selling their products to the state for distribution through its private retailers and direct to military retailers without payment of any state taxes. Pars. 14-15, Stipulation, App. 36-38.

No supplier protested his obligation to collect and remit to the state its wholesale mark-up when the clubs exercised their option to purchase direct from them instead of from the state. The only protestants were the club purchasers, and their protests had no substance. The clubs were protesting the mark-up while accepting the tax benefit provided. They bought gin and whiskey at a price 50 cents a fifth cheaper than the private retailers paid for it, but still complained that it was unjust to charge them with a mark-up to cover wholesale services that had to be performed by someone else.

Moreover, the clubs deliberately avoided a test of the regulation's legality for more than five years.[3] The government's attempt to repudiate its bargain was, and is, as Judge Cox held in his concurring opinion, a try for unjust enrichment.

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[3] This suit was not brought until more than three years after collection of the mark-up began. Docket Entries, App. 1. No motion was made for a preliminary injunction even then, and the defendants forced the trial by moving for a summary judgment. Ibid, App. 3.

II. No United States Statute or Regulation Requires Any Military Agency to Purchase Alcoholic Beverages Without Regard for State Law.

The applicable Defense Department Regulation requires cooperation between base commanders and state regulatory officials. Directive 1330. 15, Par. IV C1, App. 31-32. On June 9, 1966, that paragraph of the regulation was amended by deleting the requirement that alcoholic beverage purchases for resale be made "without regard to prices locally established by state statute or otherwise." Change 1 to Directive 1330. 15, App. 34. This left the directive requiring only that such purchases be made "in such a manner and such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." App. 32. Mississippi's regulation did not become effective until September 1, 1966. App. 36.

In trying to prove that this amendment did not require those purchases to be made in accordance with Mississippi law, the government succeeded only in proving that the mark-up payments involved here were made in compliance with the government's own regulation.[4] On April 15, 1966, Assistant Secretary of Defense Morris had proposed an amendment that would require price negotiations with state officials where the state was the only wholesaler and advised the Secretaries of the three military departments that a price "which results in an adequate profit to the installation

[4] This alleged proof consists of self-serving Defense Department memoranda appearing at App. 44-57, that were attached as exhibits to paragraph 9 of the Stipulation, App. 34. They are plainly incompetent to prove any fact asserted by the United States. They do, however, contain admissions against interest that are usable by Mississippi.

is a satisfactory implementation of the policy of Section IV C.1. of DOD Directive 1330. 15. . . ." App. 43.

The stipulation shows that each of the Mississippi installations earned profits (Par. 19, App. 39-40) and no attempt was made to show that these profits were inadequate. Indeed the memorandum from the Navy to Mr. Morris of April 22, 1966, shows that in Michigan, Oregon, and Washington the naval installations were paying "net mark-ups over costs to state stores imposed upon Military Messes" of about 30%, 70%, and 45% respectively. App. 45. Yet Mississippi's maximum mark-up was only 20% of the supplier's price. The Navy did not say that those much higher mark-ups had prevented any of its installations in Michigan, Oregon, or Washington from earning an adequate profit.

The Navy's plea for resisting similar mark-ups in other states was simply that "the increased costs would be extremely detrimental to morale."[5] App. 46. This concern with morale was more formally spelled out in the government's answers to Mississippi's interrogatories. These answers say that Mississippi installations couldn't pay the state's wholesale mark-up and still earn enough alcoholic beverage profits for entertainment and recreational purposes because higher resale prices than those prevailing in other states might make "service at installations in Mississippi less attractive than in other states. . . ." Stipulation, par. App. 40-41.

The quoted answer is unconvincing because Section V B.3. of Directive 1330.15, requires all of the military

[5] Like the Navy, the Army's only objection was that profit margins would be reduced or selling prices increased. App. 49. The Air Force was concerned only that "procurement should be on a competitive basis to the maximum practical extent." App. 51.

clubs' resale prices "to be within (10%) of the lowest prevailing rates of civilian outlets in the area." App. 33. No matter what state a military base is in, the club's prices are thus geared to private prices, and there is no escape for servicemen from the substantial price disparities that exist between states.

Mississippi's private retailers pay, in addition to the same wholesale mark-up as that paid by the military clubs, a Mississippi gallonage tax of $2.50 a gallon on distilled spirits. Compliance with the federal regulation noted above, preventing resale prices more than 10% below private prices, meant that the Mississippi clubs could only charge lower resale prices that were roughly proportional to the club's lower purchase costs. Since the operating costs of the military clubs, usually rent-free, are obviously less than those of the private stores, the combined effect of the applicable state and federal regulations was to assure adequate profits for the clubs, as well as lower prices for their customers than private retailers charge.

Moreover, this regulation was not an exercise of the general constitutional powers conferred by the Supremacy Clause. It was issued pursuant to a federal statute that raised no constitutional question; Section 6 of the 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473. Stipulation, par. 6. App. 29-30.

There is no hint in its language or history that this law was meant to supersede state control of the terms on which alcoholic beverages are sold to military bases for resale. On its face it does no more than authorize the Secretary of Defense to make criminally enforcable liquor regulations "at or near" military bases that

would supplement state law.[6] Its brief history demonstrates no purpose to supersede any commercial aspect of the system of state laws controlling the liquor traffic that was brought into being by the 21st Amendment.

Section 6 was an amendment adopted by agreement on April 13, 1951, minutes before the House passed the 1951 Draft Extension Bill, designated S 1, 82nd Congress. 97 Cong. Rec. Part 3, p. 3914. This amendment was offered by Congressman Cole of New York as a substitute for an amendment, offered a few minutes earlier by Congressman Bryson of South Carolina, that would have prohibited sale or possession of any beverage containing an alcoholic content of more than one-half of one percent at any selective service training camp. Ibid, p. 3902. Cole then offered his substitute amendment as better adapted to dealing with military alcoholic beverage problems, because Bryson's "applies only to the Training Corps and not to all camps and posts of the armed forces." Ibid, p. 3902. Bryson said that Cole's substitute amendment was agreeable to him. Cole's amendment was then adopted without any debate or vote. Ibid, p. 3902.

In adopting this routine amendment by agreement, the Congress could not have supposed that it was raising a 21st Amendment question. Any statement that the purpose of the Amendment was to allow military agencies to buy alcoholic beverages at cheaper prices than state law permitted, for resale by the drink or by

[6] The Assimilative Crimes Act of 1948, 18 U.S.C. §13, had made violations of state law at military bases over which the United States had acquired "exclusive or concurrent jurisdiction," 18 U.S.C. § 7(3), punishable as federal crimes. The constitutionality of the Act's prospective application was sustained in *United States v. Sharpnack*, 355 U.S. 286 (1958).

the bottle, would have precipitated a spirited debate. There were then seventeen states [7] that had preempted for themselves the retailing or wholesaling or both of alcoholic beverages as a source of income and control, who would certainly have been heard from.

As we shall show in the next section, the Court below correctly concluded that the 21st Amendment prevented such preemption of a vital state concern by the federal government. This view might well have prevented the enactment of Section 6, had its sponsor expressed the purpose argued here by the government. But this Court need not speculate as to why the Congress passed this 1951 legislation or why the Defense Department amended its regulation in June 1966.[8] It is plain that the amended regulation, as interpreted by the Department itself, did not require avoidance of state purchasing requirements if they resulted in a price that would yield an adequate resale profit. Mississippi's regulation met that test and the protests that led to the government's suit had no lawful basis.

III. The 21st Amendment Authorizes Mississippi to Collect Its Wholesale Mark-Up on Alcoholic Beverage Sales to Military Agencies for Resale at Bases in Mississippi.

The government's constitutional argument affects more states than Mississippi. We therefore first indicate the practical contours of the constitutional questions the Court is being asked to consider. We then

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[7] Alabama, Idaho, Iowa, Maine, Michigan, Montana, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

[8] A good reason for the June amendment not mentioned in the government's self-serving documentation was this Court's decision in *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 on April 19, 1966, and the denial of rehearing on May 31, 1966, 384 U.S. 967.

show that the government's argument is premised on a constitutional doctrine of intergovernmental tax immunity discarded by both the Congress and this Court long ago, and specifically rejected in this Court's decisions construing the 21st Amendment.

Mississippi is the latest of eighteen states to implement the powers granted in the 21st Amendment by making itself the exclusive wholesaler of distilled spirits and wine in the state.[9] Most of those states are also the exclusive retailers of distilled spirits within their respective borders. The theory underlying all of these state laws is that they are an effective means of preventing undesirable commercial marketing practices while gaining maximum revenue for the state. The eighteen states that use this method of controlling the liquor traffic are collectively known as the monopoly or control states.

The other thirty-two states all control their liquor traffic by licensing requirements that are also designed to prevent marketing abuses and to assure collection of substantial revenues by the imposition of state excise taxes, commonly called gallonage taxes. They are collectively known as the license states.

The decision the government is asking this Court to make would deprive both license and control states of alcoholic beverage revenues that they have been collecting without challenge by the United States for almost forty years. The states are presently collecting millions of dollars annually, by way of excise taxes and wholesaler's mark-ups, upon sales made for resale at domestic military bases.

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[9] See page 10, footnote 7, for a list of the other seventeen.

These bases are not states in any 21st Amendment sense. The sponsors of that amendment would have been astounded by the government's assertion that domestic federal enclaves form a second system of controlling the liquor traffic, administered by the federal government. In addition to repealing the 18th Amendment (national prohibition) the 21st won a century-old struggle by the states against frustration of their control of the liquor traffic by repeated holdings of Commerce Clause supremacy. Cf. *Leisy* v. *Hardin,* 135 U.S. 100 (1890). Section 2 of this 1933 amendment therefore spelled out in the clearest possible terms the future supremacy of state control over commerce in alcoholic beverages. The assertion in the government's brief (p. 25) that it merely restored to the states their pre-18th amendment powers is not borne out by the cited senatorial remarks.

The government's brief neglects to note what the Senate debate it refers to was about. As originally submitted to the Senate, the amendment had a Section 3: "Congress shall have concurrent powers to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." Senator Wagner of New York showed that the system of dual state and federal control authorized by this section would revive most of the evils that the 21st Amendment was meant to abolish. 76 Cong. Rec. Part 4, pp. 4145-48. The Majority Leader, Senator Robinson of Arkansas, then proposed elimination of this section. *Ibid* p. 4171. After Senator Black of Alabama eloquently pointed out the practical impossibility of a dual federal-state system, Section 3 was eliminated (*Ibid.* pp. 4177-79).[10]

[10] The House debates (76 Cong. Rec. Part 4, pp. 4508-29) throw no light on the purpose of eliminating the above quoted Section 3, because it had been deleted before the House considered the amendment.

The military control system has flourished in recent years only because the states themselves have been reluctant to use their full 21st Amendment rights in dealing with the Defense Department. That department has so many valuable trade and economic benefits to dispense that there are solid political and economic reasons for many state administrations to accommodate Defense Department demands having no basis in constitutional law.

There is no uniformity in state law and practice in dealing with military sales, even among the control states. Mississippi, Idaho, Michigan, Oregon, and Washington apply their respective wholesale mark-ups to such sales while the other thirteen control states do not. The license state with the most bases, California, collects excise taxes on such sales of distilled spirits and wine, but many license states do not.

We respectfully suggest that the failure of the United States to challenge the validity of this long-established collection of mark-ups and taxes between the adoption of the 21st Amendment and the time this suit was brought indicates a lack of merit in the government's argument that these collections violate the federal constitution. That argument assumes that Mississippi's mark-up is, in practical effect, an excise tax that cannot constitutionally be applied to sales made to military bases because the tax is included in the prices paid by military purchasers. The government is apparently seriously urging that this is an unconstitutional burden on national defense.

Even the shortest course in intergovernmental tax immunity teaches that the inclusion of state excise taxes in prices paid by the federal government is now a routine and constitutional burden that a federal system cannot avoid. Nearly sixty years ago the Court

rejected a claim that a state excise tax on insurance premiums was unconstitutional when included in the cost of surety bond premiums borne by the federal government. *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U.S. 319 (1916). We do not believe that the government itself has since made a similar claim before the instant case was brought.[11]

There is no constitutional magic in the fact that the payments challenged here are included in prices paid by agencies of the government related to national defense. This Court's repudiation of prior federal immunity holdings during World War II should have laid that notion to rest. When the government urged that its enormous emergency base construction costs were being unconstitutionally inflated by the collection of state sales taxes from federal contractors, the Court upheld the application of these taxes to defense construction contracts, even though cost-plus terms forced their payment out of the federal treasury. This was found to be a normal and constitutional aspect of our federal system. *Alabama* v. *King & Boozer,* 314 U.S. 1, 9 (1941).

The general principles of intergovernmental tax immunity expressed in that case were specifically applied to military bases by a 1947 statute, popularly known as the Buck Act. 61 Stat. 641, 4 U.S.C. § 105, *et seq.* That federal statute authorizes the application of state sales and use taxes to all post exchange purchases of general merchandise occurring "in whole or in part within a federal area." 4 U.S.C. § 105(a). The Act exempts from such taxes only the "sale, purchase,

[11] The closest seem to be the arguments rejected in *Detroit* v. *Murray Corp.,* 355 U.S. 489 (1958), and *United States* v. *Boyd,* 378 U.S. 39 (1964).

storage, or use of tangible personal property *sold by the United States or any instrumentality thereof* to any authorized purchaser." 4 U.S.C. § 107(a). An authorized purchaser is one permitted to purchase *"from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States,* under regulations promulgated by the departmental secretary having jurisdiction over such branch." Emphasis ours. 4 U.S.C. § 107(b).

Since the only military purchases to which Mississippi's wholesale mark-up applies are purchases made from the state or from private suppliers, even if the mark-up is regarded as a sales tax, such an application has been approved by express congressional action. In short, the Buck Act declared a federal policy against state tax immunity that the government has misstated at page 29 of its brief.

The only recent intergovernmental tax immunity case relied upon by the government is *Agricultural National Bank* v. *Tax Commission,* 392 U.S. 339 (1968), cited at page 28 of the government's brief. In that case the Court's majority declined to reach the constitutional question of whether national banks were nontaxable by Massachusetts as federal instrumentalities. 392 U.S. 339, 341. The only judges who did reach that question all thought the state tax there involved was constitutional. 392 U.S. 339, 359.

No decision of this Court since the 21st Amendment has sustained a claim of intergovernmental tax immunity as to domestic commerce in alcoholic beverages. Yet the government argues that state excise taxes on liquor bought for resale at military bases are an un-

constitutional burden on national defense while state taxes that increase the cost of direct national defense expenditures are not.

The first 21st Amendment case to reject the theory of intergovernmental tax immunity advanced in the government's brief is *Ohio* v. *Helvering*, 292 U.S. 360 (1934). Ohio claimed that application of the federal excise tax to the liquor bought and sold by it, was an unconstitutional interference with the state's sovereignty since the liquor business in that state was conducted only by the sovereign. The Court rejected the claim by pointing out that when a state chooses to resell alcoholic beverages, even as Ohio did, both to raise revenue and to assure publicly beneficial control, the state becomes subject to non-discriminatory federal excise taxation of what it buys. When the reverse situation was presented in *Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938), the Court held that California could collect its excise tax on all liquor sales made to a federal concessionnaire in Yosemite Park for resale there. 304 U.S. 518, 534-36.

The government's assertion that *Collins* "stands for the proposition that, in the absence of an express reservation, the state derives no power from the Twenty-first Amendment to regulate" the importation of liquor into "exclusive jurisdiction" bases (Brief, p. 19) is patently wrong. If, as the park concessionnaire claimed, the fact that he was acting as a federal agent on a federal enclave gave him a federal constitutional immunity from state excise taxation, whatever California said or did was immaterial. California either had a constitutional right to apply its tax or it didn't. If the federal constitution denied that

right, California couldn't create it, by legislation or otherwise.

The Court recognized in *Collins* that a constitutional policy precluding state control of conduct on federal enclaves has no sensible application to state control over sales of liquor made to such an enclave for resale there. This is California's unchallenged view of *Collins*. In dealing with alcoholic beverages sold to military bases, California draws no distinction based on the terms of cession. Section 32201 of California's Revenue and Taxation Code imposes an excise tax of two dollars per gallon on all sellers of distilled spirits "within areas over which the federal government has jurisdiction." All Army, Navy and Air Force bases are specifically exempted from beer taxes; in 1967, Marine and Coast Guard bases were also specifically exempted from such taxes. Section 32177. But the California excise tax on wine and spirits is applied indiscriminately to all military bases and other federal enclaves, without objection from the United States.[12]

This Court's unbroken line of decisions rejecting claims of immunity from State taxes on domestic liquor sales was continued this term in *Hueblein, Inc.* v. *South Carolina Tax Commission*, No. 71-879, —— U.S. ——, decided December 18, 1972. The slip opinion (p. 9-10) reaffirms this Court's prior broad construction of the 21st Amendment, as described in *Hostetter* v. *Idlewild*, 377 U.S. 324, 330 (1964), although the decision turned on the construction of a federal statute.

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[12] In *National Distillers* v. *State Board*, 83 Cal. App. 2nd 35, 187 Pac. 2d 821 (1947), a California appellate Court rejected the distiller's claim that whiskey bought by the Army for medical purposes was non-taxable by California.

The oddest aspect of the government's effort to overturn the cases denying state tax immunity to domestic liquor sales is the failure of its brief to suggest any reason of public policy or common sense for doing so. The government's legal argument comes down to a strange reliance on *Department of Revenue* v. *James Beam Distilling Co.*, 377 U.S. 347 (1964), argued and decided with the *Idlewild* case. The *Beam* case concluded, as did *Idlewild*, that the 21st Amendment had not repealed the Export-Import Clause of the constitution. Yet in *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966), the Court upheld a broad application of New York's right to control the prices at which liquor is bought in that state that impinged directly upon the Commerce Clause.

Seagram is still the most recent decision by this Court applying the 21st Amendment to domestic commerce. The Court held there that New York's law requiring each supplier to affirm that the prices at which it sold in New York were no higher than the prices it charged elsewhere in the United States did not violate the Commerce Clause, notwithstanding possible effects of the law on prices in other states. 384 U.S. 35, 43-45.

State liquor regulation cannot tightly confine its effects to one state any more than military liquor regulation can confine its effects to military bases. We have a federal system that permits all citizens to move freely in and among our states. We do not confine drinking by members of the armed forces to the military bases where they serve nor do we prevent them from enjoying nearby publicly available residential, educational and recreational facilities provided by the

taxpayers of the surrounding states. The armed forces have been allowed to operate in Mississippi as many base liquor stores as they think they need to provide money for special recreation facilities not made generally available to other citizens. Military personnel are not, however, a caste so privileged that liquor must be provided for it at the expense of state revenues.

As we have shown, Mississippi has provided the military clubs with cheaper liquor than its private retailers get and the clubs have resold it at a profit. No effort was made below to show that even cheaper alcoholic drinks for any or all of the clubs' patrons would aid the defense of the country. Even if the Defense Department's contention that military morale can't be sustained without low priced liquor is regarded as a truth that judges must accept without proof, the government made no case.

The government's argument that Mississippi's regulation prevented compliance with federal procurement policy by fixing minimum prices is wrong on both facts and the law. The statement at page 39 of the government's brief that Mississippi's regulation artificially inflated "the price at which the military facilities could otherwise obtain their liquor" is pure fiction. No evidence was offered as to what the price would have been absent the regulation and it might well have been higher than it was. Equally untrue is the government's page 39 assertion that the regulation, in effect, "sets a floating minimum price level which is 17 to 20% above the most advantageous price".[13] In fact

[13] A crap game is said to "float" when it moves. So is the gold price of the dollar when it fluctuates. Anything at once both "set" and "floating" defies linguistic analysis.

Mississippi sets no price for any suppliers product. Each supplier sets his own price and there was no showing in the record made below that there was not vigorous price competition between suppliers or between their various brands of distilled spirits and wine, whether sold to the military or to private retailers. If the "most advantageous price" meant a competitive price, the regulation deprived no one of such a price. If, on the other hand, the "most advantageous price" meant a price lower than the economics of wholesale distribution permit, then no Mississippi retailer got it or could reasonably expect to have it.

The government's reliance on the *Paul* case (Brief, p. 35), to show that the nonappropriated fund instrumentalities involved here are legally bound by the statutory competitive procurement standards controlling treasury purchases, is mistaken. That case plainly holds that they are not. *Paul* v. *United States,* 371 U.S. 245, 269.[14] The Court's caveat that the state's power to regulate price must antedate the acquisition of the bases where the nonappropriated fund agencies operate is true here. Mississippi's power to regulate liquor prices was granted by the 21st Amendment in 1933. The state did not choose to abandon total prohibition for commercial regulation until 1966, but that choice was available during each of the thirty-two previous years. While the instant case involves no state establishment of minimum prices, even if it had, the *Paul* case alone would require affirmance.

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[14] The Court said "But since there is no conflicting federal policy concerning purchases and sales from nonappropriated funds, we conclude that the current price controls over milk are applicable to these sales, provided the basic state law authorizing such control has been in effect since the times of these various acquisitions."

As this Court has just pointed out, the 21st Amendment undoubtedly strengthens the case for upholding state control of the liquor traffic against competing constitutional claims. *California* v. *LaRue,* No. 71-36, — U.S. —, decided December 5, 1972. Slip opinion, p. 6. The competing constitutional claim pressed against Mississippi is for a military defense of the country, dependent upon supplying members of the Armed Forces, their families, and their guests, with even cheaper alcoholic beverages than Mississippi has generously provided. Surely the Constitution of the United States allows enough respect for the sovereign rights of the member states to bar such a gross perversion of the letter and intent of the 21st Amendment.

We respectfully submit that the decision of the Court below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* STATE TAX COMMISSION OF MISSISSIPPI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 72–350. Argued March 19, 1973—Decided June 4, 1973

The United States brought this action contesting the validity of appellee Tax Commission's regulation requiring out-of-state liquor distillers and suppliers to collect and remit to the Commission a wholesale markup on liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within Mississippi, over two of which the United States exercises exclusive jurisdiction, and the remaining two of which concurrent jurisdiction. Relying on the Twenty-first Amendment, the District Court upheld the regulation. *Held:*

1. The Twenty-first Amendment does not empower a State to tax or otherwise regulate the importation of distilled spirits into a territory over which the United States exercises exclusive jurisdiction, *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, regardless of whether some of the liquor may have been consumed off base. Pp. 6–15.

2. Whether the markup can be viewed as a sales tax to whose imposition in the context of the two exclusive-jurisdiction bases the United States has consented under the Buck Act, and whether, in any event, the markup unconstitutionally taxes federal instrumentalities, and violates the Supremacy Clause as conflicting with federal procurement regulations and policy, are issues that the District Court did not reach and should consider initially on remand. Pp. 15–18.

340 F. Supp. 903, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which REHNQUIST, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 72-350

United States, Appellant, v. State Tax Commission of Mississippi et al. | On Appeal from the United States District Court for the Southern District of Mississippi.

[June 4, 1973]

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we are called upon to review the judgment of the District Court for the Southern District of Mississippi that the State of Mississippi may require out-of-state liquor distillers and suppliers to collect and remit to the State a wholesale markup on liquor sold to officers' clubs, ship stores, and post exchanges located on various military bases over which the United States exercises either exclusive jurisdiction or jurisdiction concurrent with the State.

Prior to 1966, the State of Mississippi prohibited the sale or possession of alcoholic beverages within its borders. In that year, Mississippi passed a local option alcoholic beverage control law subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages distributed within the State.[1] The Tax Commission was given exclusive authority to act as wholesale distributor in the sale of alcoholic beverages to licensed retailers within the State "including, at the discretion of the Commission, any retail distributors operating within any military post . . . within the boundaries of the State, . . . exercising such control

[1] Miss. Code Ann. § 10265-01 *et seq.* (Cum. Supp. 1972).

over the distribution of alcoholic beverages as [seems] right and proper in keeping with the provisions and purposes of this act." [2] In conjunction with these transactions with retailers, the Commission was directed to "add to the cost of all alcoholic beverages such . . . markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states." [3] Under the authority granted to it by the act, the Tax Commission promulgated Regulation 25 [4] which gives military post exchanges, ship stores, and officers' clubs the option of purchasing liquor either from the Commission or directly from the distiller. However, insofar as purchases are made directly from the distillers by such military facilities, the regulation requires the distiller to collect and remit to the Tax Commission the latter's "usual wholesale markup." During the period involved in this case, the Tax Commission's wholesale markup was 17% on distilled spirits and 20% on wine.

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[2] *Id.*, § 10265–18 (c).

[3] *Id.*, § 10265–106.

[4] The Regulation, which was originally numbered 22, reads as follows:

"Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

"All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month."

Four United States military bases are located in the State of Mississippi—Keesler Air Force Base, the Naval Construction Battalion Center, Columbus Air Force Base, and Meridian Naval Air Station. Prior to 1966, the officers' clubs, the post exchanges, and the ship stores—which are run with funds derived from operations rather than from funds appropriated by the United States—on these four bases had purchased liquor from distillers and suppliers located outside the State of Mississippi. Following the passage of the Mississippi local option law, these nonappropriated fund activities elected to continue the practice of purchasing liquor supplies outside the State rather than to purchase liquor from the Commission. Efforts were made by military authorities to convince the Commission not to collect the markup on out-of-state liquor purchases by nonappropriated fund activities, but these efforts failed, and the Commission compelled out-of-state distillers and suppliers to collect and remit the markup on military sales under threat of criminal prosecution and of delisting, that is, withdrawal of the privilege of selling to the Commission for retailing within Mississippi.[5] The military authorities sought to pay the markup into an escrow fund pending judicial determination of the legality of the markup as applied to military purchases. But the Commission refused to accept such an arrangement, and in order to obtain liquor supplies the nonappropriated fund activities have had to pay the markup to the distillers and suppliers, albeit under protest.[6]

In November 1969, the United States brought this action seeking declaratory and injunctive relief against the continued enforcement of Regulation 25, plus a judgment in the total amount paid to the Commission, through

[5] See Stipulation of Facts, App., at 36–38 (hereinafter Stipulation).

[6] Out-of-state suppliers had been paid $648,421.92 under protest for such markups by July 31, 1971.

the suppliers, since the imposition of the markup on military purchases. The complaint alleged that the United States has exclusive jurisdiction over Keesler Air Force Base and the Naval Construction Battalion Center, and that Mississippi and the United States exercise concurrent jurisdiction over Columbus Air Force Base and Meridian Naval Air Station. The complaint contended that the Regulation was invalid because it constituted an attempt by the State to legislate with respect to military facilities and territory over which the Congress has exclusive legislative authority;[7] to impose a tax on federal instrumentalities and thereby infringe upon the Federal Government's immunity from state taxation;[8] and to interfere with federal procurement regulations and policy established by the Secretary of Defense pursuant to authority granted to him by Congress.[9] The complaint also asked that a three-judge court be convened.

On cross motions for summary judgment, the District Court ruled in favor of the Commission, upholding the validity of the challenged Regulation. 340 F. Supp. 903 (SD Miss. 1972). The District Court agreed that the United States had exclusive jurisdiction over two of the four bases and concurrent jurisdiction over the remaining two. But it concluded that Congress' constitutional powers over the military forces and over territory belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction."

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[7] See U. S. Const., Art. I, § 8, cl. 14 and 17, Art. IV, § 3.
[8] See, *e. g.*, *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819).
[9] See 32 CFR § 261.4 (c).

Id., at 904. In light of this conclusion the District Court found it unnecessary to consider the import of the procurement regulations issued by the Secretary of Defense. Nor did it discuss the contention that the markup constituted an impermissible tax upon federal instrumentalities. On appeal by the United States, we noted probable jurisdiction, 409 U. S. 1005 (1972).[10] For the reasons which follow, we now hold that the District Court erred in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction,[11] and we vacate and remand the

[10] See *Paul* v. *United States*, 371 U. S. 245, 249–250 (1963).

[11] In a special concurring opinion, Judge Cox added that recoupment of the sums paid under the markup was also barred because, in his view, the payments had been voluntarily made by the nonappropriated fund activities. 340 F. Supp., at 909. It is true that where voluntary payment is knowingly made pursuant to an illegal demand, recovery of that payment may be denied. See, *e. g.*, *United States* v. *New York and Cuba Mail S. S. Co.*, 200 U. S. 488, 493–494 (1906); *Little* v. *Bowers*, 134 U. S. 547, 554 (1890); *Railroad Co.* v. *Commissioners*, 98 U. S. 541, 543–544 (1878). But no such voluntary payments are involved here. The Tax Commission refused to accept an escrow arrangement and it made clear to the out-of-state suppliers that severe sanctions would be applied to anyone who failed to charge the markup and to remit the resulting funds to it. Thus, the Tax Commission gave the nonappropriated fund activities no choice except to pay the markup—either to itself or to the out-of-state suppliers—in order to obtain liquor supplies or else to cease dispensing alcoholic beverages altogether—that is, to discontinue an entire line of business. Obviously, this was no choice at all. The payments of the markup were obtained only by coercion; they were paid under protest; and thus they hardly can be said to have been voluntary. See, *e. g.*, *Ward* v. *Board of County Commissioners of Love County*, 253 U. S. 17, 23 (1920); *Atchison, Topeka & Santa Fe R. Co.* v. *O'Connor*, 223 U. S. 280, 286–287 (1912); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329 (1909); *Swift Co.* v. *United States*, 111 U. S. 22, 28–29 (1884).

case to the District Court for consideration of further arguments, relevant to the nonappropriated fund activities on all four bases, that it did not reach.

I

A. With respect to the two bases over which it claims exclusive jurisdiction, Keesler Air Force Base and the Naval Construction Battalion Center, the Government places principal reliance upon Art. I, § 8, cl. 17, of the Constitution. That Clause empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

In *Pacific Coast Dairy, Inc.* v. *Dept. of Agriculture*, 318 U. S. 285 (1943), the Court considered that Clause sufficient to render ineffective an attempt by the State of California to fix the prices at which California milk producers could sell milk to military authorities at Moffett Field over which the United States exercised exclusive jurisdiction.

> "When the federal government acquired the tract [upon which Moffet Field was located], local law not inconsistent with federal policy remained in force until altered by national legislation. The state statute involved was adopted long after the transfer of sovereignty and was without force in the enclave. It follows that contracts to sell and sales consummated within the enclave cannot be regulated by the California law. To hold otherwise would be to affirm that California may ignore the Constitutional provision that 'This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . .' It would be a denial of the

federal power 'to exercise exclusive Legislation.' As respects such federal territory Congress has the combined powers of a general and a state government." *Id.*, at 294 (footnotes omitted).

The view of Art. I, § 8, cl. 17, expressed in *Pacific Coast Dairy* was reaffirmed in *Paul* v. *United States*, 371 U. S. 245, 263–270 (1963). There the Court was confronted with another attempt by California to enforce minimum wholesale price regulations on sales of milk to the United States at three other military installations located within the State. A portion of the milk was purchased—as are the liquor supplies here at issue—with nonappropriated funds for use at officers' clubs and for resale at post exchanges. As to these nonappropriated fund purchases, the Court found it necessary to remand the case to determine whether the state regulatory scheme predated the transfer of sovereignty over any of the particular bases to the United States,[12] and, even if not, whether the United States in fact exercised exclusive jurisdiction over the areas in which purchases and sales of milk were made. But in so doing the Court emphasized that "[t]he cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 7, by its own weight, bars state regulation without specific congressional action." *Id.*, at 263.

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[12] "The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be without a developed legal system for private rights." *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 99–100 (1940).

See also *Pacific Coast Dairy, Inc.* v. *Dept. of Agriculture*, 318 U. S. 285, 294 (1943); *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, 318 (1934); *Chicago, R. I. & P. R. Co.* v. *McGlinn*, 114 U. S. 542, 546–547 (1885).

Were it not for the fact that we deal here with a State's attempt to regulate and derive income from wholesale transactions in liquor—a fact which raises further questions as to the extent of the power conferred upon the States under the Twenty-first Amendment and the possibility of consent by the United States to state taxation—*Pacific Coast Dairy* and *Paul* would seem to be sufficient to dispose of this case insofar as Keesler Air Force Base and the Naval Construction Battalion Center are concerned. See also *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140 (1937); *Standard Oil Co.* v. *California*, 291 U. S. 242 (1934). The transactions here at issue are strictly between the United States and out-of-state distillers and suppliers. The goods are ordered by the officers' clubs and other nonappropriated fund activities and then delivered within the military bases over which the United States claims exclusive jurisdiction. Thus, with respect to the initial sale and delivery of the liquor by the suppliers to military facilities located in exclusively federal enclaves, nothing occurs within the State that gives it jurisdiction to regulate the initial wholesale transaction.[13] Cf. *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361, 382–383 (1964); *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261 (1943).

There can be no question that the tracts of land upon which Keesler Air Force Base and the Naval Construction Battalion Center are located were "purchased by the Consent of the Legislature" of Mississippi within the meaning of Art. I, § 8, cl. 17. Despite its ultimate resolution of the case, the District Court acknowledged that the United States had acquired exclusive jurisdiction over these two bases. 340 F. Supp., at 904, 906. The Federal

[13] The State's power to regulate transportation of alcoholic beverages through its territory to the bases or from the bases back into its jurisdiction is, however, a different question, see pp. ——–——, *infra*.

Government acquired the relevant lands by condemnation between 1941 and 1950.[14] And, throughout the period of acquisition, the State had expressly given its "consent . . . , in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state . . . for customs houses, post offices, or other public buildings," [15] subject only to the right of the State to serve civil and criminal process upon such public lands.[16] True, the assent of the United States to the exercise of exclusive jurisdiction over the lands occupied by the two bases was a necessary final step in light of 40 U. S. C. § 255,[17] but such assent was given through a

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[14] See Stipulation, App., at 28–29, and Ex. 1–7. It is well established that land which the Government acquires by condemnation has been "purchased" within the meaning of Clause 17. See *Paul* v. *United States*, 371 U. S., at 264; *Humble Pipe Line Co.* v. *Waggonner*, 376 U. S. 369, 371–372 (1964).

[15] Miss. Code Ann. § 4153. General consent statutes are not uncommon, see *Paul* v. *United States*, 371 U. S., at 265 and n. 31; *James* v. *Dravo Contracting Co.*, 302 U. S., at 143 and n. 4, and they are as effective for purposes of Art. I, § 8, cl. 17, as consent to each particular acquisition, see *Paul* v. *United States*, 371 U. S., at 268–269.

[16] See Miss. Code Ann. § 4154. The effectiveness of such qualifications to consent has long been accepted, see, *e. g.*, *Paul* v. *United States*, 371 U. S., at 264–265; *James* v. *Dravo Contracting Co.*, 302 U. S., at 146–149.

[17] Section 255 provides in relevant part:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or par-

series of letter from Government officials to the governors of Mississippi between 1942 and 1950.[18]

Accordingly, unless the fact that in this case the State has attempted to derive revenue from private wholesale liquor transactions provides a decisive distinction, our prior cases make it clear that the Tax Commission could not attach its markup to the sale and delivery of liquor by out-of-state suppliers to nonappropriated fund activities within Keesler Air Force Base and the Naval Construction Battalion Center.

B. But the Tax Commission contends—as the District Court held—that the application of the markup regulation to the two bases over which the United States exercises exclusive jurisdiction is sustainable on the basis of the broad regulatory authority conferred upon the States in the Twenty-first Amendment. The second section of the Twenty-first Amendment provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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tial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

[18] See Stipulation, App., at 28–29, and Ex. 1–7.

Since the challenged regulation first became effective in 1966, long after the United States had acquired jurisdiction over the bases, there is no question here as to the application within a federal enclave of a state law that predates the transfer of sovereign authority, see n. 12, *supra*.

In *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938), a concessionaire which operated hotels, camps, and stores in Yosemite National Park, under a contract with the Secretary of the Interior, sought to enjoin the efforts of California authorities to enforce the State's Alcoholic Beverage Control Act within the limits of the Park. The state liquor law would have required the concessionaire to apply for permits for the importation and sale of liquor and to pay related taxes and fees. The Court found that the State had ceded to the United States, and that the United States had accepted, exclusive jurisdiction over Yosemite National Park, except insofar as the State had expressly reserved the right to tax persons and corporations within the Park. *Id.*, at 527–530. In light of this determination, the Court held that "[a]s there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the Act"—namely, the provisions concerning importation and sales permits—"are unenforceable in the Park." *Id.*, at 530. In support of its attempt to apply the permit provisions within the Park, the State placed specific reliance upon the regulatory authority conferred upon it by § 2 of the Twenty-first Amendment. But the Court rejected this argument, agreeing instead with the District Court's conclusion "that though the Amendment may have increased 'the state's power to deal with the problem . . . [of liquor importation], it did not increase its jurisdiction.'" *Id.*, at 538. The Court then went on to state:

> "As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty. Where

> exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." *Ibid.* (Footnotes omitted.)

It is true, as the Tax Commission argues, that the Court did sustain the application of the tax provisions of the state liquor law within the Park. But this aspect of the decision was bottomed specifically on the State's reservation of taxing authority in its cession of lands to the United States, *id.*, at 532, 536.

Collins would seem to compel the conclusion that absent an appropriate express reservation—which is lacking here—the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction. See also *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383 (1944). Certainly, the Amendment was intended to free the State of "traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter* v. *Idlewild Bon Voyage Liquor Co.*, 377 U. S. 324, 330 (1964). See also *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 42 (1966). But the Government contends that here, as in *Collins*, there was no "transportation or importation [of liquor] into [the] State . . . for delivery or use therein" within the meaning of the second section and therefore the Twenty-first Amendment does not assist the Tax Commission's case. We agree.

The District Court acknowledged that Keesler Air Force Base and the Naval Construction Battalion Center "are to Mississippi as the territory of one of her sister states or a foreign land. They constitute federal islands which no longer constitute any part of Mississippi nor function under its control." 340 F. Supp., at 906. And

it recognized that in light of *Collins*, "[t]he importation of property onto these bases for use thereon would clearly be outside of the ambit of the XXI Amendment." *Id.*, at 906–907. But the court considered *Collins* to be limited strictly to the situation in which delivery and use of the liquor was restricted to the exclusive enclave, whereas in this case "[t]he undisputed facts show that it was acquired for the purpose of being sold to individuals for their use and consumption either on the base or in the surrounding state." *Id.*, at 907. Such off-base consumption was sufficient, in the District Court's view, to subject the transactions between the out-of-state suppliers and the nonappropriated fund activities to the regulatory authority granted to Mississippi under the Twenty-first Amendment. We think, however, that the District Court unjustifiably narrowed the decision in *Collins*.

There is in fact no indication in *Collins* that the liquor purchased from the concessionaire's facilities in the Park was always consumed within the limits of the Park. To the contrary, the complaint in that case specifically stated that the liquor imported for sale in the park facilities was sold "for consumption on or off the premises where sold." [19] Hence, it is just as reasonable to assume that some of the liquor sold in the Park was consumed outside its limits in the State of California as it is to assume that some of the liquor sold on these two bases was ultimately consumed in the State of Mississippi.[20] The

[19] Transcript of Record, No. 870, O. T. 1937, p. 3.

[20] In fact, the record in this case contains no express indication as to the extent to which packaged liquor purchased from the nonappropriated fund activities is consumed outside the jurisdiction of the two bases. The District Court inferred off-base consumption from the facts that "numerous classes of non military persons are authorized to make purchases; and every selling facility exacts a promise from each purchaser that he will obey the laws of the state as to such of the liquor bought as may be taken off the installation." 340 F. Supp., at 905. By a parity of reasoning the likelihood that some

Collins Court, in rejecting California's reliance upon the Twenty-first Amendment, pointed, to be sure, to the fact that "delivery and use" of the liquor was "in the Park," 304 U. S., at 538. But, considered in the context of the case, the Court's reference clearly was to the transaction between the out-of-state suppliers and the park concessionaire. It was that transaction which California sought to regulate, and insofar as that transaction was concerned, the delivery and use—that is, the delivery, storage and sale—of the liquor occurred exclusively within the Park. The particular transactions at issue in this case between out-of-state suppliers and the military facilities stand on no different footing, and thus, given that the State has retained only the right to serve process on the two bases, *Collins* is dispositive of the Commission's effort to invoke the State's authority under the second section of the Twenty-first Amendment to impose its markup on these transactions.

This is not to suggest that the State is without authority either to regulate liquor shipments destined for the bases while such shipments are passing through Mississippi or to regulate the transportation of liquor off the bases and into Mississippi for consumption there. Thus, while it may be true that the mere "shipment [of liquor] through a state is not transportation or importation into the state within the meaning of the [Twenty-first] Amendment," *Carter* v. *Virginia*, 321 U. S. 131, 137 (1944), a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control such shipments during their passage through its territory insofar as necessary to prevent the "unlawful diversion" of liquor "into the internal commerce of the

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of the liquor purchased from stores located in Yosemite National Park was transported to and consumed in California is even greater since those stores were open to the public at large.

State," see *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S., at 333, 331 n. 10; *Carter* v. *Virginia*, *supra*; *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941). And the State, of course, remains free to regulate or restrict, under § 2 of the Twenty-first Amendment, the transportation off the two bases of liquor that has been purchased and is in fact "destined for use, distribution, or consumption" within its borders, see *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S., at 42; see also *California* v. *La Rue*, 409 U. S. 109, 114 (1972).

But there is no indication here that the markup is an effort to deal with problems of diversion of liquor from out-of-state shipments destined for one of the two bases. Nor need we now decide the precise parameters of the State's authority to regulate efforts to import liquor from the exclusively federal enclaves, since that question is not before us. For our purposes here, it suffices to note that any legitimate state interest in regulating the importation into Mississippi of liquor purchased on the bases by individuals cannot effect an extension of the State's territorial jurisdiction so as to permit it to regulate the distinct transactions between the suppliers and the nonappropriated fund activities that involve only the importation of liquor into the federal enclaves which "are as to Mississippi as the territory of one of her sister states or a foreign land," 340 F. Supp., at 906. To conclude otherwise would be to give an unintended scope to a provision designed only to augment the powers of the States to regulate the importation of liquor destined for use, distribution, or consumption in its own territory, not to " 'increase its jurisdiction,' " *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S., at 538.

C. Before this Court the Tax Commission also asserts that the markup might properly be viewed as a sales tax and that the United States has consented to the imposition of such a "tax" in the context of the two ex-

clusive jurisdiction bases under the Buck Act of 1940, 4 U. S. C. §§ 105–110. Section 105 (a) of that Act provides in part:

> "No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal Area . . . ." Act of July 30, 1947, § 1, 61 Stat. 644, 4 U. S. C. § 105 (a).

However, § 107 (a) of the Act spells out certain exceptions to the consent provision contained in § 105 (a). Specifically, § 107 (a) states that § 105 (a) "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . . ." Whether the markup should be treated as a tax on sales occurring within a federal area within the meaning of § 105 (a), see also 4 U. S. C. § 110 (b), and, if so, whether the exception contained in § 107 (a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves are issues which the record reveals were never considered, much less decided, by the District Court. Having found that the District Court erred in the basis on which it did dispose of this case, we think that these additional issues are appropriately left for determination by that court in the first instance on remand.

III

The two bases over which the United States claims to exercise jurisdiction concurrent with the State—Columbus Air Force Base and Meridian Naval Air Station—present somewhat different problems. Since the United States has not acquired exclusive jurisdiction over the

land upon which these bases are located, the Government is unable to rest its claims for immunity from the markup with respect to purchases of liquor for the nonappropriated fund activities of these bases on Art. I, § 8, cl. 17. Rather, it bases its argument on the theories that the markup either is an unconstitutional tax upon instrumentalities of the United States [21] or is invalid under the Supremacy Clause because it conflicts with federal procurement regulations and policy.[22] The District Court specifically found it unnecessary to reach the Government's argument under the Supremacy Clause, and implicitly declined to reach the Government's argument concerning taxation of United States instrumentalities. Instead, having concluded that, despite Art. I, § 8, cl. 17, the Twenty-first Amendment permitted the Tax Commission to apply the markup to out-of-state purchases destined for nonappropriated fund activities on the two bases over which the United States exercises exclusive jurisdiction, the District Court simply reasoned that "[a] fortiori, the liquor sales made on the two bases over which the federal and state governments exercise concurrent jurisdiction—Meridian and Columbus—are subject to Mississippi law." 340 F. Supp., at 907.

The District Court's rationale for adopting this view is not entirely clear. Certainly it was correct when it further observed that "as to the concurrent jurisdiction bases, the liquor sales transaction occurred within the jurisdiction of the State of Mississippi, even where consumption or other use of the liquor was consummated within the territorial confines of the base." *Id.*, at 907. But this serves only to dispose of any question under Art. I, § 8, cl. 17. As already noted, however, the Government does not purport to rest its case with respect to transaction

[21] See, *e. g.*, *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819).

[22] See 32 CFR § 261.4 (c). See also *Paul* v. *United States*, 371 U. S. 245, 253 (1963).

involving the two bases over which it exercises only concurrent jurisdiction upon that Clause. In any event, we have now concluded that the District Court erred in ruling that the Twenty-first Amendment empowered the State Tax Commission to apply the markup to transactions between out-of-state distillers and nonappropriated fund activities located on the two exclusively federal enclaves. Our conclusion eliminates the essential premise of the District Court's decision concerning the two concurrent jurisdiction bases. While the arguments upon which the Government does rely with respect to the purchase of liquor destined for those two bases present, to be sure, only questions of law which we might now decide, we believe it would be useful to have the views of the District Court on these additional arguments, and we therefore remand the case to the District Court to allow it to consider initially the Government's instrumentality and Supremacy Clause arguments. Cf. *Lewis* v. *Martin*, 397 U. S. 552, 560 (1970); *FCC* v. *WJR*, 337 U. S. 265, 285 (1949).

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-350

United States, Appellant, *v.* State Tax Commission of Mississippi et al.	On Appeal from the United States District Court for the Southern District of Mississippi.

[June 4, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

This is an amazing decision doing irreparable harm to the cause of states rights under the Twenty-first Amendment. That Amendment gives the states pervasive control over the "transportation . . . into [the] State . . . for delivery or use therein of intoxicating liquors in violation" of its laws. The liquors cannot reach these federal enclaves unless they are transported into or across the State and they are obviously delivered and used within Mississippi.

Two of the Posts are inland enclaves within the State. Two are on Mississippi's coastline. But to reach the latter by water a vessel must enter Mississippi's territorial waters. As we held in *Skiriotes* v. *Florida*, 313 U. S. 69, the territorial waters are part of the domain over which the coastal State has sovereignty. These shipments therefore constitute "transportation or importation into" Mississippi for "delivery . . . therein of intoxicating liquors" within the meaning of the Twenty-first Amendment. The power of the State to bar the transportation of liquor into the State certainly includes the power to manage its distribution within the State. Mississippi has done no more than that. So it seems clear to me that this is a classic example of the exercise of basic states rights under the Twenty-first Amendment.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State,[1] like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler [2] of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

Under Mississippi law these Post Exchanges may order liquor direct from the distiller or from the state commission. The Mississippi regulation provides, "All orders of such organization shall bear the usual wholesale markup [3] in price but shall be exempt from all state taxes." The wholesale markup on distilled spirits is 17% and on wine, 20%. If the purchase is made from the distiller, it remits the wholesale markup to the State. A distiller who fails or refuses to observe these conditions is deprived of the benefits of this state law and may be prosecuted.

This suit brought before a three-judge district court was to collect the amount of the markups paid by the Post Exchanges and to enjoin the enforcement of the Mississippi regulation against distillers or suppliers doing business with the Post Exchange on the terms of Mis-

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[1] Mississippi Code Ann. § 10265–01 *et seq.*

[2] Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery with or without this State when such sale is for the purpose of resale by the purchaser." *Id.*, § 10265–05 (q).

[3] The Act provides in § 10265–106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states."

sissippi law. The three-judge District Court, relying on the Twenty-first Amendment [4] gave appellees a summary judgment, 340 F. Supp. 903. Its judgment should be affirmed.

The four federal enclaves involved in this dispute are in the State of Mississippi. The spirits are made out of State and delivered to the Post Exchanges within the State. The question is whether the terms of the Twenty-first Amendment are met, that is to say, whether there is "transportation . . . into . . . [the] State . . . for delivery or use therein of intoxicating liquors."

The spirits are not all consumed on or at the Post Exchanges. Rather they resell to members of the Armed Services, to retired members, to the families of members; and some of the spirits are consumed in Mississippi and outside the federal enclaves by guests of members and retirees and their families. As the District Court said, the spirits are not brought into the federal enclaves for sole use there. The spirits are resold to individuals for their use or consumption either on the federal enclave or in the surrounding state area.

Private retailers in Mississippi pay the State a tax of $2.50 a gallon on distilled spirits. The Post Exchanges pay no state tax on their resales; and it is stipulated that these Post Exchanges each makes a profit.

Section 6 of the Universal Military Training and Service Act, as amended in 1951, authorizes the Secretary of Defense to make regulations "governing the sale, consumption, possession of or traffic in . . . intoxicating liquors to or by members" of the Armed Forces "at or near any camp, station, post or other place primarily occupied by them." 50 U. S. C. App. § 473. And it makes

[4] It provides in § 2, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."

criminal knowing violations of such regulations. The Department of Defense Directive 1330.15 issued May 4, 1964, and amended June 9, 1966, provides that "the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States, shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." The Act and the Department of Defense regulation do not on their face purport to override or displace state price control of liquor. It is said, however, that that is immaterial.

The Solicitor General relies on Art. I, § 8, cl. 17, of the Constitution which empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." This provision, it is said, bars state price regulations as respects sales to Post Exchanges on the two federal enclaves over which the United States has exclusive jurisdiction even in absence of a conflicting federal statute or regulation. Reliance is placed on *Paul* v. *United States*, 371 U. S. 245, 263–268. The *Paul* case did not involve the Twenty-first Amendment. There post exchanges resold milk and California provided minimum wholesale price regulations; and we held that Art. I, § 8, cl. 17, "by its own weight, bars state regulations without specific Congressional action." *Id.*, at 263.

The Twenty-first Amendment and Art. I, § 8, cl. 17, are parts of the same Constitution. In *Hostetler* v. *Idlewild Liquor Corp.*, 377 U. S. 324, we held that while the Twenty-first Amendment gave the States control where otherwise the Commerce Clause would be a bar to its action (*id.*, at 330), the Twenty-first Amendment did not give a State the power to prohibit the passage of liquor

through its territory for delivery to consumers in foreign countries. Congress had enacted a law governing traffic in liquor to foreign nations; and that aspect of the Commerce Clause gave Congress exclusive authority over foreign trade. Hence it is argued here that the power of Congress to exercise exclusive jurisdiction over a federal enclave pre-empts state power. But all that we have here is "transportation" into a State not beyond it.

Collins v. *Yosemite Park Co.*, 304 U. S. 518, held as respects a *state regulatory regime* of alcoholic beverages within Yosemite National Park in California that the Twenty-first Amendment gave the State no power to supervise liquor transactions within the federal enclave. The Court said:

> "As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." *Id.*, at 538.

That observation was apt, for California undertook to assert a regulatory authority within the park. The Solicitor General presses for an application of *Collins* to the present Post Exchanges. Yet Mississippi asserts no regulatory power over these military bases nor over the dispensing of liquor by the Post Exchanges. Mississippi only collects a tax from out-of-state distillers and suppliers who ship liquor to the Post Exchanges. Those shipments, as noted, must enter Mississippi to reach the military bases.

Moreover, Mississippi asserts no authority to collect the tax from the Federal Government or its instrumen-

talities, the Post Exchanges. The legal incidence of the so-called sales tax is on the distributor only. The economic incidence is of course on the Post Exchanges. But it has long been held that there is no constitutional barrier to that result.

II

That raises the other phase of the case which should be decided here, as it is covered by our decisions and requires no additional factfindings for its resolution.

At least since *Alabama* v. *King & Boozer*, 314 U. S. 1, state taxes have been upheld on those doing business with the Federal Government even as respects cost-plus contracts where the terms of the contract forced their payment out of the federal treasury.[5] The principle of

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[5] In *New York* v. *United States*, 326 U. S. 572, in discussing the Federal Government's right to levy taxes on New York State's sale of mineral waters, the Court stated, "In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based."

That trend continued in *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, where the Court upheld the validity of a state privilege tax on Esso, occasioned by its storage of gasoline owned by the United States, even though it was shown that the United States had contractually obligated itself to reimburse the contractor for any state tax liability incurred. The Court distinguished those cases which had held that there could be no state tax on federally owned property by indicating that in *Esso* the tax was on the privilege of storing Government property.

United States v. *Detroit*, 355 U. S. 466, and *United States* v. *Muskegan*, 355 U. S. 484, concerned the application of a 1953 Michigan statute providing that when tax-exempt real property is used by a private person in a business conducted for profit the private person is subject to taxation to the same extent as if he were the owner of the property. Both cases involved Government contractors occupying defense plants, one under a lease and the other under

King & Boozer permits no exception for distillers who make wholesale transactions with Post Exchanges, as the legal incidence of the tax is on the distillers, not on the Post Exchanges. Moreover, the Buck Act, 61 Stat. 641, 4 U. S. C. § 105 *et seq.*, authorizes the application of state sales and use taxes to all post exchange purchases where "the sale or use with respect to which such tax is levied, occurred in whole or in part within a Federal area." The Buck Act exempts from such taxes, sales, purchases, storage or use of personal property sold by the United States or any instrumentality thereof to "any authorized purchaser" (§ 107) who is defined as one permitted to purchase at commissaries, ship's stores, post exchanges and the like, by regulations of the departmental Secretary.

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a permit which could be terminated at will. The Court upheld the imposition of the tax, saying the constitutional immunity of the Federal Government from state taxation was not violated and that the state statute was not discriminatory nor was the statute discriminatorily administered. This result was reached, notwithstanding the fact that the Federal Government had for years reimbursed its contractors for the costs of possessory interest taxes.

In *Detroit* v. *Murray*, 355 U. S. 489, the Court upheld a tax imposed on Murray, an Air Force subcontractor, on the basis of work in process and inventory, title to which was in the Federal Government on the tax day. The Court found no constitutional impediment to permitting a possessory interest tax on Government-owned personal property. Unlike the real property situation, the Michigan statute did not specifically authorize such tax, but it was imposed pursuant to the usual personal property tax statute, levying the tax on the property. In commenting on the disparity between the statutes, the Court stated, "It is true that the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed 'for the privilege of using or possessing' personal property, but to strike down a tax on the possessor because of such a verbal omission would only prove a victory for empty formalism. And empty formalisms are too shadowy a basis for invalidating state tax laws . . . . In the circumstances of this case the state could obviate such grounds for invalidity by merely adding a few words to its statutes."

It also does not authorize "the levy or collection of any tax on or from the United States of any instrumentality thereof."

The markup which the State requires wholesalers of liquor to make is in its worst light a sales tax. There is no "levy or collection" by the State from a Post Exchange in any technical, legal sense. As noted, the economic but not the legal incidence of the tax is in the Post Exchanges. The Post Exchange is merely paying indirectly the cost of doing business in the manner in which *King* v. *Boozer* held that there was no constitutional immunity from state taxation.

That alone is sufficient to distinguish the present case from *Paul* v. *United States, supra,* where state minimum price regulations were held to be inoperative as applied to purchases of milk by federal instrumentalities, such as Post Exchanges. *Paul* in other words involved no tax at all. The levy of Mississippi on wholesalers is, as noted, a sum designed to cover the cost to the State of operating the wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring States. It is plainly therefore a tax on sales and in my view authorized by Congress under the Buck Act. The Solicitor General concedes in his brief that the Mississippi regulation "is meant only to raise revenue." By reason of the Buck Act it matters not, therefore, that the Post Exchanges, as held in *Paul,* are federal instrumentalities. Here as in *King & Boozer* we deal only with the "economic" burden of the local tax, its legal incidence being solely on the distributor.

First Agricultural National Bank v. *State Tax Commission,* 392 U. S. 339, is inapposite.

In that case Congress had specifically provided four ways in which the States could tax national banks, apart from taxes on their real estate. 392 U. S., at 341–342. Efforts to allow broader taxation were defeated in Con-

gress. Because of that history, we read the Massachusetts sales tax closely and noting that the tax was "recoverable at law" from the national bank, *id.*, at 347, held that it transcended the congressional waiver of immunity.

That case does not control here for two reasons.

First, the legal incidence of the present tax is not in the Post Exchanges, only the economic incidence.

Second, the Massachusetts sales tax had no relation to the Twenty-first Amendment. The present case involves "transportation or importation" of liquor into the State of Mississippi over which the State has plenary control. The State, having the power to bar liquor completely from Mississippi, can admit it on such terms and conditions which she chooses. If she sought to levy a tax on the Post Exchanges a different issue would arise. But there is no federal immunity against including state costs in federal contracts.

While the Buck Act by § 107 (a) bars a state tax on federal instrumentalities—which as *Paul* holds includes Post Exchanges—*King & Boozer* allows a state tax on those who, like the wholesalers in this case, do business with the United States. *King & Boozer*, decided in 1941, stated the modern version of the scope of intergovernmental immunity,[6] in light of which the Buck Act was

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[6] During the first third of this century the doctrine of intergovernmental immunity, as it applies to state taxation of allegedly federal governmental activities, went through a highly expansive phase. Among the taxes held invalid were the following: sales tax on articles sold to the government, *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218); income tax on earnings from patents and copyrights, *Long* v. *Rockwood*, 277 U. S. 142; income tax on income derived by lessees of public lands, *Gillespie* v. *Oklahoma*, 257 U. S. 501.

At the same time, however, a number of inroads or qualifications on the doctrine were established. Among the taxes held valid were the following: corporate franchise tax measured by income including that from government bonds, *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; inheritance or estate tax measured in part by government bonds,

passed in 1947. The present case is therefore on all fours with the excise tax imposed by Florida on milk distributors who in turn sold to federal enclaves. In referring to the Buck Act we said:

> "We think this provision provides ample basis for Florida to levy a tax measured by the amount of milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida." *Polar Co.* v. *Andrews*, 375 U. S. 361, 383.

The judgment below should be affirmed.

Plummer v. *Coler*, 178 U. S. 115; income tax on capital gain on resale of government bonds, *Willcutts* v. *Bunn*, 282 U. S. 216; income tax on net income of contractors with the government, *Metcalf* v. *Mitchell*, 269 U. S. 514. This trend culminated in the decision of the Court in *Alabama* v. *King & Boozer*, *supra*.

That trend lead a commentator to note, "Today, the United States conducts much of its business through a vast number of private parties. The trend in the U. S. Supreme Court has been to reject immunizing these private parties from nondiscriminatory state taxes, as a matter of constitutional law, even though the United States bears the economic brunt of the tax, indirectly in some instances, by inclusion in price, and more directly in many instances, by reimbursement to the contractor as an item of cost." (Rollman, Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes, 38 N. D. L. Rev. 26, 30.)